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The attitude of the American Congress prior to the recent outbreak of hostilities seems to have been precisely the reverse of that which the framers of the constitution expected it to adopt. The danger apprehended by those far-sighted politicians and jurists was that, if the power of declaring war were given to the President, he might involve the nation in a contest against its wishes. They, accordingly, curtailed in this respect the functions usually possessed by the executive department of the Government, and provided that it should rest with the Legislature to say whether the emergency was one which called for the *ultima ratio regum*, their theory being, as Chancellor Kent observes (I Comm. p. 52), that "nothing short of a strong case deeply affecting essential rights, and which could not receive a pacific adjustment, after all reasonable efforts should have been exhausted, would ever prevail upon Congress to declare war." The President and Congress, however, may be said, during the last few weeks, to have exchanged the roles which they were to play, and the world has been treated to the curious spectacle of a Legislature which was intended to act as a drag upon the executive, slighting the temperate counsels of Mr. McKinley and rushing precipitately into a war which a large proportion of the citizens regard as wholly unjustifiable, or at least unnecessary, under the circumstances, and which might possibly have been avoided, and the desired result attained, by the "pacific adjustment" of cool-headed diplomacy. Whether the President in the now famous message, in which, after explaining the situation in Cuba and the different courses which might be pursued, left to Congress the responsibility of deciding between them, discharged his functions precisely in the manner originally contemplated by those who defined them, is an interesting question which we

shall not attempt to discuss. We cannot help thinking, however, that a document which appears to have been framed upon the model of a charge delivered to a jury by an extremely cautious judge who is anxious to avoid any very decided expression of opinion, was scarcely the kind of address which the gravity of the crisis demanded. However this may be we most heartily sympathize with those citizens of the great republic. who, disregarding their material interests, are honestly desirous (unfortunately there are many clamourers who are not honest) of righting the wrongs inflicted upon an oppressed and misgoverned people by a nation which still lives in the darkness, superstition and cruelty of the Middle Ages.

By the recent decision in *Pedigo* v. *Commonwealth*, the Kentucky Court of Appeal may be said to have given a new meaning to the adage which tells us that "every dog has his day," etc., and indeed to have raised one species of our faithful canine friends to a position of wholly unprecedented dignity. A majority of the judges have held that the mere fact of a bloodhound's having taken up the trail of the defendant at the scene of a crime and followed it to his residence, is admissible in evidence against him, although as there was nothing else to show that he had actually been at the spot, and, for aught that appeared the scent might have travelled a considerable distance before it struck the animal's sense of smell. The "bloodhound witness case," as it is now commonly termed, has naturally excited a good deal of attention in the United States. That the instincts of dogs may often furnish valuable testimony under appropriate circumstances is not to be denied, and the same remark may be made with reference to their sense of smell. But it is rather startling to find a decision even by a divided court to the effect that the liberty of a citizen may be jeopardized by information procured in the manner described in this case. The only redeeming feature of the majority opinion is that it restricts the use of such evidence within very narrow limits, and requires so many conditions precedent to be satisfied that if

the lines laid down are closely adhered to by trial judges, the number of instances in which any harm would ensue would be very small. One judge dissented, and his reasoning is, to our mind, quite unanswerable. His opinion is too long to quote, but any of our readers who take an interest in the eccentricities of jurisprudence will find it set out at length in the *Albany Law Journal* of Feb. 26, 1898 (p. 139). Can it possibly be that the learned judges who constituted the majority of the court had been reading that sensational, and, it is to be feared, somewhat imaginary account of the tracking of the hero of Mr. Hall Caine's "Christian?" Even so, it seems as though they had "bettered the instruction."

ASSOCIATION OF THE BAR OF NEW YORK.

It is interesting to note the provision made in English speaking countries, other than our own, for the use, convenience and comfort of the legal profession. We had the pleasure recently of learning something of the Association of the Bar of the City of New York, on which occasion its privileges were most courteously extended to the writer.

This association is in fact a club. It is not open to the profession at large, but is only for those who are elected as members, and whose character and reputation are fully vouched for, after the personal scrutiny of the committee. Although only organized in 1870, it has a membership of over 1,500, composed of the most desirable professional men in the city, and up to this date it has a library consisting of some 54,000 volumes. Our library at Osgoode Hall gives us the use of about 35,000 volumes. It contains complete sets of English, American and Canadian Reports, and an almost perfect set of the statutes of these countries. It was interesting to be told that of this large library some 16,000 volumes have from time to time been presented by various members of the association; a brilliant testimony to their munificence and liberality. These gifts include many rare books and interesting pamphlets, many of them being nowhere else obtainable.

This library is said to be the most complete law library in existence in the various branches of English and American jurisprudence.

The new home of the association, No. 42 West 44th st., is a building which is architecturally admirable, and most commodious and perfect in all its details. Whilst we do not feel equal to the task of adequately describing its beauty and completeness, it needs no technical skill to discern that in every part there has not only been lavish expenditure, but the best taste displayed.

On entering, one's attention is at once called to the magnificent appearance of the entrance hall, with its beautiful marble pillars, wainscoting and staircases, On either side of this hall are reception rooms, containing writing tables, magazines, newspapers, current law reviews and books of general literature, as well as committee rooms, office, cloak room, etc. An elevator takes you to the second floor, where there are large club rooms where the members meet for conference or conversation, and a large hall for the more formal gatherings. These various rooms are decorated and furnished in perfect taste, rich, but severe in style, as becomes the solemnity of the law. The third floor contains what is called the "stack room," for old tomes and books in less frequent use, with ample space for additions. There are also smaller rooms for consultation and other purposes. "But where," we asked, "is the library?" The acceptance of a courteous request to again enter the elevator answered the question. The fourth story is devoted to it. Here, away from interruption and the noises of a busy city, is the workroom of this beautiful building. It is to this room we would specially direct attention for the manifold conveniences connected with it. It is certainly a most attractive place, with its high ceiling, with central clere-story, supported by pillars, its large and open fireplace at each end of the room, its various alcoves where are the many books in general use. Numberless comfortable seats, with desks adjacent, provide amply for the convenience of the members, having an electric light to each desk in the library. Electric bells summon boys, who bring

books as they are needed, so that no time is lost or labour unnecessarily expended in hunting for them. All this, of course, costs money, as well as careful supervision, but a fee of $40 per annum from the older members and $20 from the younger, makes ample provision for all needs.

The beauty and convenience of the building is not greater than was the kind courtesy of a friend, one of the members, and of the House Committee, in according to the writer the temporary use of the library, "with its appurtenances and all the privileges and advantages derivable therefrom or connected therewith." When we are rich enough at Osgoode Hall (and the present economical rule will soon make it so, unless indeed the Legislature interferes to gobble up a foolish accumulation) we shall, without thinking any the less of our own loved Alma Mater and the many beauties of our hall and its court rooms, have many things to learn from the New York Bar Association, its munificent patrons, liberal-minded members, and its beautiful and commodious building.

EMPLOYER'S LIABILITY TO SERVANT.

THE POSITION OF A SERVANT WHO CONTINUES WORK ON THE FAITH OF HIS MASTER'S PROMISE TO REMOVE A SPECIFIC CAUSE OF DANGER.

I.—Introductory.—The continuance of work by a servant who has learnt that he is exposed to an extraordinary danger arising from the defective condition of some instrumentality used by the master obviously raises both the question whether he has elected to include the additional risk among those which he is deemed to have accepted by virtue of his contractual relations, and the question whether under the circumstances he is acting prudently in remaining in a position where he will have to incur the new hazard. If, therefore, he receives an injury owing to the existence of such a peril after it has become known to him, it is open to the master to rely either upon the defence of assumption of risks or upon the defence of contributory negligence. It is manifest that the situation is not altered in

these broader aspects where the work is continued for the reason that the servant is assured by the master or by some agent authorized to speak for him, that steps will be taken to remedy the defective conditions to which the extraordinary danger is traceable. That the promise was made, and that the servant's conduct was influenced by it, are circumstances which merely introduce new factors into the investigation (*a*). The two defences will be available to the master whether he has undertaken to remove the cause of danger or not (*b*). Practically the sole result of the giving of the promise is to diminish the number of cases in which the court would be justified in pronouncing, as a matter of law, that one or other of those defences is open to the master (*c*).

In England the exposition of the law which was furnished in the well-known case of *Holmes* v. *Clark* (*d*) seems to have entirely satisfied the profession, for since the date of that decision no court of review has ever been invited to discuss the subject (*e*). In the United States, on the other hand, that case merely had the effect of opening the floodgates of litiga-

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(*a*) *Manufacturing Co.* v. *Morissey* (1883), 40 Ohio street, 148.

(*b*) If specific authority be needed for a proposition so simple, it will be sufficient to refer to *Holmes* v. *Clark* (1862), 7 H. & N. 937; (see more especially the opinion of Crompton, J., who stated that he founded his judgment on two propositions, viz., that there was no defence under the principle of law laid down in *Priestley* v. *Fowler* (1837), 3 M. & W. 1, and that the plaintiff had not contributed to his injury by his own negligence.)—See also *Lewis* v. *New York, &c., R. Co.* (1891), 153 Mass. 73; 10 L.R.A. 513; *Schlaker* v. *Mining Co.* (1891), 89 Mich. 253. Sometimes, it may be observed in passing, the ambiguity of the phrase "assumption of risks," which in common parlance covers negligent conduct, has produced an apparent confusion between the two defences: see, for example, *Roux* v. *Blodgett, &c., Co.* (1891), 85 Mich. 519. Those who wish to see how far this misuse of words has been carried in the judgments of American courts are referred to an article by the present writer in the American Law Review for September, 1897.

(*c*) The effect thus ascribed to a promise to remove a specific cause of danger is, it will be observed, analogous to that ascribed to a direct order, which, under appropriate circumstances, operates as an implied assurance that there is no *present* danger, and relieves the servant of the imputation of contributory negligence, except in cases in which no prudent man would have obeyed the order: *Patterson* v. *Pittsburgh, &c., R. Co.* (1874), 76 Pa. 389; *Chicago, &c., R. Co.* v. *Bayfield* (1877), 37 Mich. 204. Not infrequently the evidence shows a reliance by the servant on an assurance of present safety, as well as a promise to make such changes as will restore the defective instrumentality to its usual condition: *Flynn* v. *Kansas City, &c., R. Co.* (1883), 78 Mo. 195; *Sendzikowski* v. *McCormick Mach. Co.* (1895), 58 Ill. App. 418.

(*d*) (1862), 7 H. & N. 937.

(*e*) *Holmes* v. *Worthington*, 2 F. & F. 533, a nisi prius case tried pending the appeal in *Holmes* v. *Clark*, is of interest chiefly because it reports a charge to the jury by Willes, J., one of the judges who afterwards concurred in the decision in that case in the Exchequer Chamber. The question does not appear to have yet come under the consideration of any Canadian court whose decisions are reported.

tion, and the frequent adjudications on the subject to be found in the American reports evince the assiduity with which the jurists of that country have devoted themselves to the solution of the minor problems which are involved in the application of the general doctrine. That many of these problems are still regarded by them as open to debate is indicated in a very striking manner by the fact that there was quite recently an almost equal division of opinion in the Supreme Court of Illinois with regard to the phraseology which should be used by a trial judge in instructing the jury as to the length of time during which the servant is entitled to remain at work after the giving of the promise, without being disabled from maintaining his action (*a*). But, on the whole, it may be said that the outcome of the prolonged discussion has been to produce a fairly stable and definite body of rules, and, as there is at least a possibility that cases of this type may be presented under the Canadian Employers' Liability Act, a review of the entire subject, in which the English decisions will be supplemented and illustrated by the vast mass of materials accumulated by our neighbors will perhaps be not unwelcome to the readers of this journal. The limitations upon our space will prevent our dwelling much upon the specific facts involved in the cases, but, as the authorities will all be cited, the inquirer will have a ready means of access to all the learning there may be in the reports upon any particular point.

II.—Relation between the master and servant after a promise, generally.—The first question which demands an answer is—what is the true rationale of the contractual relations between the master and the servant after the former has promised to remove a danger which threatens the latter? Upon this point there is a considerable difference of judicial opinion. To us the most satisfactory theory seems to be that indicated by the remark which Byles, J., interjected during the argument of counsel in the leading case of *Holmes* v. *Clark* (*b*),

(*a*) See *Illinois Steel Co.* v. *Mann* (1897), 43 N.E. 418. The substance of this case will be stated below. See sec. V, note (*z*)

(*b*) (1862), 7 H. & N. 937.

where the servant was injured by machinery, left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not the contract of the plaintiff: 'I will work with fenced machinery'; after it was broken, was not the contract: 'I will continue to work, if you will restore the fencing?'" This conception of a change in the implied terms of the contract does not, however, appear to have been very generally adopted (*a*).

Perhaps the most generally received view is that the inference which would normally be drawn, that the servant intended to assume the new risk, or was guilty of contributory negligence, in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a certain right of action which, apart from the promise, would be imputed to the servant as a consequence of his continuance of work, will not be implied where a promise has been given. Thus in the case just cited Cockburn, C.J., draws a distinction between "the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied," and lays it down that, "in the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation" (*b*).

(*a*) *In Greene* v. *Minneapolis, &c., R. Co.* (1884), 31 *Minn.* 248, the court favoured that reason for the rule which would place it on the ground of "a contract on the part of the employee that, if a servant continues in the service, in the meantime and until the defects are remedied, the employer and not the servant will assume the risks," but it is not easy to say from this statement whether it is referable to the idea of a substituted contract, or of the continuance of the original one. That the true rationale of the situation existing after the promise is that a new conditional contract comes into force is indicated very strongly by those cases in which the promise to remove a specific cause of danger is given *before* the servant undertakes his work: *Hyatt* v. *Hannibal, &c., R. Co.* (1885), 19 Mo. App. 287, [master liable for exposing servant to extreme cold, against which he has been assured that he will be protected]: *Cheeney* v. *Ocean S. Co.* (1893), 92 Ga. 726, [master liable for injuries resulting from his violation of a promise to station a man at the hatch of a ship in order to protect labourers in the hold while the loading is going on].

(*b*) Compare the statement of Mr. Cooley in his well-known work on Torts, p. 559, that "the assurances of the master that the danger will be removed remove all ground for argument that the servant by continuing to work engages to assume the risk," (quoted with approval in *Hough* v. *Railway Co.*, 100 U.S. 213). See also the language used in *Picart* v. *Chicago, &c. R. Co.* (1891), 82 Iowa 148; *Texas, &c., R. Co.* v. *Bingle* (1894), 9 Tex. Civ. App. 322.

Another way of stating the legal situation is that the promise continues or revives the original liability of the master (*a*), or what amounts to the same thing, operates as an implied request to the servant to remain in the service, and an assumption of the risk in the meantime (*b*). This theory, however, is open to the objection pointed out by the Supreme Court of Texas (*c*), that, if the original contract is by the hypothesis continued, it is difficult to offer any adequate reason for making a distinction between the effect of an express promise and the effect of the implied promise which that contract is presumed to include.

So far as the servant's rights of recovery are concerned, it is clearly immaterial which of these theories is assumed to be the correct one. In the one case the suit is brought for the breach of the original contract which, by the hypothesis, is kept alive by the promise, unaffected by the inferences which would ordinarily be drawn from the fact that the servant has gone on working with a knowledge of the danger caused by the breach. In the other case the servant seeks to enforce rights alleged to have been acquired by a substituted contract. Whichever view is adopted, therefore, the grounds upon which the master will be able to resist the action must be essentially alike, and the measure of damages the same. His aim will be to show that although the effect of the promise may have been to keep the original contract in force, or to create a new one, the servant has remained so long in the employment that any virtue which the promise may have possessed has been exhausted, the inference being that he has assumed the new risk as a matter of contract, or that, even assuming that he has not lost his contractual rights, the danger to which the promise related was such that a prudent man would not have exposed himself to it at all, or at least would not have exposed himself to it so long as the plaintiff has done. In practice it will be found that the rights

(*a*) *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123.

(*b*) *Galveston, &c., R. Co.* v. *Drew*, (1883), 59 Tex. 10; compare *Eureka Co.* v. *Bass* (1886), 81 Ala. 200; *Schlitz* v. *Pabst Brewing Co.* (Minn. Supr. Ct. 1894); 59 N.W. 531.

(*c*) *Galveston, &c., R. Co.* v. *Brentford* (1891), 79 Tex. 619.

of the parties have almost invariably been settled by determining whether the latter of these defences is available. It is obviously a matter of extreme difficulty to fix, upon any satisfactory principle, the limits of a period after which the servant will be deemed to have accepted the new risk, while on the other hand, the circumstances involved in cases of this type are such as will naturally invite a consideration of the servant's conduct as suggesting the exercise or non-exercise of care on his part. The following sections, therefore, will necessarily take the shape of a review of the conclusions at which the courts have arrived in dealing with the effect of a promise from this standpoint.

III.—When the Defence of Contributory Negligence is open to the Master.—The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review, will be found to depend upon two considerations, viz., whether the election to take the risk was prudent, and, if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger (*a*). These two points are manifestly quite distinct, though they are sometimes not distinguished as clearly as they should be by the courts (*b*). The latter, however, has no direct connection with the promise, and nearly involves a special application of the general principle that everyone is bound to use that degree of care which the circumstances require (*c*). Confining our attention, therefore, to the former point, we find that the courts are unanimous as regards the doctrine that, "if under all the circumstances, and in view of a promise to remedy the defect, the servant was not wanting in due care in continuing to use the defective appliance, the master will not be excused for its failure to supply proper instrumentalities, upon the ground of contributory negligence" (*d*). In

(*a*) *Counsell* v. *Hall* (1887), 145 Mass. 468.

(*b*) See, for example, *Corcoran* v. *Milwaukee Gas Light Co.* (1892), 81 Wis. 191, where the court seems to waver betwen a theory which would deprive the servant of a right to recover on the ground of negligence in continuing to work, and the theory that he did not take appropriate preuautions in view of the dangers of the situation.

(*c*) See the case just cited, and *Meador* v. *Lake Shore, &c., R. Co.* (1894), 138 Ind. 290.

(*d*) *Hough* v. *Railway Co.*, 100 U.S. 213.

other words, the servant's continuance of work with knowledge of a danger will not be pronounced negligence, as a matter of law, where the continuance was induced by a promise of the master to remove the cause of that danger (*a*). The theory is that, in view of the giving of the promise, the servant's knowledge and appreciation of the risk is to be regarded, not as a fact which conclusively charges him with negligence, but simply as a fact which may be considered with others as bearing upon that point (*b*). To preclude the servant, therefore, from maintaining an action where he has been assured that a defect will be remedied, it must be shown that his voluntary exposure to danger was for, some special reason, imprudent under the circumstances. Was he, in other words, justified in believing that by exercising an appropriate degree of care he could avoid an accident until the promise was fulfilled? (*c*).

An answer to this question may be arrived at by considering both the elements which, in a given case, indicate what may be termed the aggregate amount of the danger to which the servant has exposed himself by continuing work, viz.: the imminence and greatness of the peril, and the length of time during which the exposure to it has continued. On the one hand, the more serious the peril, the more rapidly will the permissible period of continuance run out. In some instances, indeed, the peril may be of such a kind that nothing can excuse the servant for continuing to expose himself to it a moment after he knows it to exist (*d*). On the other hand,

(*a*) *Holmes* v. *Clark* (1862), 7 H. & N. 937: *Laning* v. *New York, &c., C. Co.* (1872) 49 N.Y. 521 *Roux* v. *Blodgett, &c., Co.* (1891), 85 Mich. 519; *Lyttle* v. *Chicago, &c., C. Co.* (1890), 84 Mich. 289; *Northern, &c., C. Co.* v. *Babcock* (1893), 154 U.S. 190; *Kane* v. *Northern Centr. R. Co.* (1888), 128 U.S. 94; *New Jersey, &c., C. Co.* v. *Young* (1892), 49 Fed. 725; *Union Mfg. Co.* v. *Morissey* (1883), 40 Ohio St. 148; 48 Am. Rep. 669; *Wust* v. *Erie City Iron Works*, (1892), 149 Pa. St. 263; *Gulf &c., R. Co.* v. *Donnelly* (1888), 70 Tex. 371; *St. Clair Nail Co.* v. *Smith* (1890), 43 *Ill. App.* 105; *Missouri Furnace Co.* v. *Abend* (1883), 107 Ill. 44; 47 Am. Rep. 425; *Fairbank* v. *Haentsche* (1874), 73 Ill. 236; *McKelvey* v. *Chesapeake, &c., R. Co.* (1891), 35 W. Va., 500; *Gibson* v. *Minneapolis, &c., R. Co.* (1893), 55 Minn. 177; *Greene* v. *Minneapolis, &c., C. Co.* (1884), 31 Min. 248; *Lyberg* v. *Northern P. R. Co.* (1885), 39 Minn. 15.

(*b*) *Holmes* v. *Clarke* (1862), 7 H. & N. 937.

(*c*) *Conroy* v. *Vulcan Iron Works*, 6 Mo. App. 102; *Sioux City, &c., R. Co.* v. *Finlayson* (1884), 16 Neb. 578; 49 Am. Rep. 724, are cases in which the fact that the servant believed that he might go on working safely if he exercised care was emphasized.

(*d*) That cases in which the use of dangerous explosives found to be defective is involved would fall into this category is, perhaps, a reasonable inference from the language used in *Eureka Co.* v. *Bass* (1886), 81 Ala. 200; *Davis* v. *Graham* (1892), 2 Colo. App. 210.

the fact that some accident will sooner or later occur as a result of exposure to an even moderate peril, when it is constantly incurred for a considerable period, justifies the argument that, the longer the time that has elapsed without a fulfilment of the promise to remedy a defect, the more certainly has the servant been guilty of negligence in continuing in the employment.

IV.—The extent of the danger incurred—the servants' culpability tested by.—It is obvious that the doctrine which makes the servants' right of recovery dependent upon the extent of the danger may be stated in two forms. We may say that the mere giving of a promise will not of itself suspend the operation of the principle that a servant cannot recover for an injury of which his own negligence was an efficient cause, and that he will, therefore, be unable to maintain an action wherever the danger to which he was exposed after receiving the promise is such that no man of ordinary prudence would have run the hazard of remaining in the employment (*a*). Or we may say that the giving of the promise will entitle the servant to recover for any injury received within a reasonable time after the promise was given, unless the danger which the master agreed to remove was so great that no prudent man would have exposed himself to it. This is the form which the rule most naturally takes in cases in which the servant's action is held to be maintainable (*b*).

(*a*) *Holmes* v. *Clarke* (1862), 7 H. & N. 937; *District of Columbia* v. *McElligott* (1885), 117 U.S. 621; *Kane* v. *Northern R. Co.* (1888), 128 U.S. 91; *Indianapolis, &c.*, v. *Watson* (1887), 114 Ind. 20; *Railway Co.* v. *Kelton* (1892), 55 Ark. 933; *Texas, &c., R. Co.* v. *Bingle* (1895), 9 Tex. Civ. App. 322 (1895); *McAndrews* v. *Montana U. R. Co.* (1894), 15 Mont. 290. An instruction is erroneous which in effect declares as a conclusion of law, that, if the master promised repairs, he is liable without regard to the character of the defects, or the probability or improbability of danger, or whether, all things considered, the plaintiff was or was not so negligent in continuing to work that he ought not to recover: *McKelvey* v. *Chesapeake, &c., R. Co.* (1891), 35 W. Va. 500. Compare *Counsell* v. *Hall* (1888), 145 Mass. 468; *Gulf, &c. R. Co.* v. *Brentford* (1891), 79 Tex. 619; *International &c. R. Co.* v. *Williams* (1891), 82 Tex. 342

(*b*) *Brownfield* v. *Hughes* (1889), 128 Pa. 194; *Patterson* v. *Pittsburg, &c., C. Co.* (1874), 76 Pa. 389; *Conroy* v. *Vulcan I. Works* (1876), 62 Mo. 35; *Rothenberger* v. *Northwestern, etc., Co.* (Minn. Supr. Ct., 1894), 59 N. W. 531; *Greene* v. *Minneapolis, &c., R. Co.* (1884), 31 Minn. 249; *Harris* v. *Hewitt* (Minn. Sup. Ct., 1896), 65 N.W. 1085; *Smith* v. *Backus L. Co.* (Minn. Supr. Ct., 1896) 67 N.W. 358; *Homestake Min. Co.* v *Fullerton* (1895), 69 Fed. 23 (C. C. A.); *Atchison, &c., C. Co.* v. *Midgett* (Kan. App. 1895), 40 Pac. 535. A finding, in answer to a special interrogatory, that the danger of using a defective appliance was great, apparent, and continuous, will not overcome the effect of a general verdict for the plaintiff, where there is no finding that an ordinarily prudent man would not have used it under the circumstances: *Indianapolis, &c., R. Co.* v. *Ott.* (Kan. App. 1893), 38 N. E. 842; 39 N. E. 52.

Usually, of course, it is a question of fact for the jury whether the defect was such that only an imprudent man would have continued to use the defective appliance (*a*). But sometimes a court will undertake to declare, as a matter of law, that the continuance of work was negligence, as where the servant drove a vicious horse with an old and rotten harness, although the employer had promised to fix the harness or give him a new one—especially where a new harness had been furnished which the servant might have used (*b*).

In determining whether or not due care has been observed in a given case, the giving of the promise, and the natural effect which that circumstance would produce upon the mind of a man of ordinary prudence, are to be taken into consideration (*c*). It has been very truly remarked that, relying upon the promises of a master to remove the cause of danger, "the most prudent workmen will often take risks, not merely on account of their own necessities, but in consideration of their employers whose interests require their continued service" (*d*).

V.—The length of the period during which the work was continued—the servants' culpability tested by.—It is well settled that, except in cases where there is an imminent danger of injury (*e*), or, in other words, that, in every case where the servant has good grounds for believing that he may safely remain in the service (*f*), he is entitled to continue at work for a reasonable time after the promise is received without being held guilty of contributory negligence (*g*). What is a reasonable time under the circumstances must,

(*a*) *Hough* v. *Railway Co.* (1879), 100 U.S. 213; *Holmes* v. *Clarke* (1862), 7 H. & N. 937 *Smith* v. *Backus L. Co.* (Minn. Supt. Ct., 1896), 67 N.W. 358; *Schlitz* v. *Pabst Brewing Co.* (Minn. Sup. Ct., 1894), 59 N.W. 188.

(*b*) *Levesque* v. *Janson* (1895), 165 Mass. 16.

(*c*) *Texas, &c., R. Co.* v. *Bingle* (1895), 9 Tex. Civ. App. 322.

(*d*) *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148.

(*e*) *Atchison, &c., R. Co.* v. *Midgett* (Kan. App. 1895), 40 Pac. 995; *Greene* v. *Minneapolis, &c., R. Co* (1884), 31 Minn. 249.

(*f*) *Conroy* v. *Vulcan I. Works* (1878), 62 Mo. 35; 6 Mo. App. 102.

(*g*) *Lyttle* v. *Chicago, &c., R. Co.* (1890), 84 Mich. 289; *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123; *Ferriss* v. *Berlin Mach. Works* (1895), 90 Wis. 541; *Breckenridge Co.* v. *Hicks* (Ky. Ct. of App; 1893), 22 S.W. 554. *In Stephenson* v. *Duncan*, 73 Wis. 404, the complaint was held fatally defective for the reason that it averred that the defendant had ample time to put the appliance in safe condition between the time when the plaintiff informed him of the defect and the time of the injury. This allegation was held to imply that the plaintiff continued in his employment beyond the time within which he might reasonably expect the defendant would keep his promise and remedy the defect.

it is evident, ordinarily be a question for the jury (*a*). But doubtless the master would properly be held liable, as a matter of law, for an injury occurring within any specific period covered by the promise, provided the danger was not so great that the servant was bound, as a prudent man, to quit the service immediately after ascertaining the existence of that danger (*b*).

Some authorities interpret the phrase "reasonable time" as meaning such a time as would reasonably be allowed for the performance of the promise (*c*), or the time which may elapse "while the servant is reasonably expecting the promise to be performed" (*d*). Others amplify this statement by declaring that the servant can recover for an injury caused by the defect "within such a time after the promise as would be reasonably allowed for the performance, or within any period which would not preclude all reasonable expectation that the promise might be kept" (*e*). Others, again, have undertaken to impart greater definiteness to the rather vague expression, "reasonable time," by enunciating the doctrine that, as "a promise already broken can afford no reasonable guaranty of the fulfilment of any expectation based on its disappointed assur-

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(*a*) *Joliet, &c., R. Co.* v. *Velie* (Ill. 1896), 26 N.E. 1086; *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148; *Smith* v. *Backus L. Co.* (Minn. Sup. Ct., 1894), 67 N.W. 358; *Belair* v. *Chicago, &c., R Co.* (1876), 43 Iowa 662; *Ferriss* v. *Berlin Mach. Works* (1895), 90 Wis. 541. The question of reasonableness cannot be determined from the lapse of time alone, but depends upon the circumstances—the frequency with which the servant was called upon to handle the defective appliance after the promise was received, the opportunities he may have had to examine it, and the necessity for making that examination, in view of his complaint as to its condition, and the right he had to suppose it had been repaired in pursuance of the promise: *Belair* v. *Chicago, &c., R. Co.* (1876), 43 Iowa 662, where the court refused to say, as a matter of law, that a brakeman waived his objection to a defective draw-bar by continuing in the service for about three months, during which time he had occasional opportunities for ascertaining whether the master's promise had been kept.

(*b*) *Greene* v. *Minneapolis, &c., R. Co.*, (1884), 31 Minn. 249.

(*c*) *Rothenberger* v. *Northwestern Milling Co.* (Minn. Sup. Ct. 1894), 59 N.W. 53; *Parody* v. *Chicago, etc., R. Co.* (1882), 15 Fed. 205.

(*d*) *Counsell* v. *Hall* (1888), 145 Mass. 468.

(*e*) *Shearman & Redf. Negl.* sec. 96, quoted with approval in *Hough* v. *Railway Co.* (1879), 100 U.S. 213. In a very recent Illinois case, already referred to, (*Illinois Steel Co.* v. *Mann* (1897), 43 N.E. 418), four members of the court were of opinion that the servant is justified in remaining in the service only for such time as is reasonably sufficient to enable the master to remove the defect, while the other three held that a reasonable time is the time during which the servant is authorized in the exercise of reason and prudence to rely upon the promise. The view of the dissentient minority appears to be more in harmony with the general principles which determine the servant's rights under these circumstances, and is substantially the same as that adopted in the decision in the cases cited above.

ances," the servant is not in the exercise of due care if he remains in the service after the period fixed for the completion of the repairs has come to an end without the master's having kept his promise (*a*). This doctrine is tantamount to an assertion that the general rule as to the effect of a promise is applicable only in cases in which the servant continues in the service supposing that the defect has been already remedied (*b*), and would withdraw the question of the master's liability from the jury in every case in which a breach of the promise was shown. But any such rigid presumption would seem to be scarcely consistent with a reasonable construction of the general principle that dominates cases of this type, viz., that the question whether the plaintiff was negligent in being in the service when he was injured is one of fact to be decided with due reference to all the testimony produced. So far as this particular aspect of the question is concerned, the correct theory would rather seem to be that the servant's continuance of work with knowledge that the promised repairs have not been made within the time stipulated merely affords "a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk" (*c*).

That the servant, when he is called upon to work with an appliance which he has ceased to handle since the master promised to repair it, may or may not be justified, according to the circumstances, in acting upon the presumption that the repairs have been completed, is clear both upon principle and authority. Thus on the one hand it has been held that an employee who knows that the machine at which he works is out of repair, and that a fellow servant has been ordered to repair it on a specified day, is guilty of such contributory negligence as will prevent a recovery for an injury resulting from such defect, in subsequently going to work upon the machine of his own accord, without ascertaining whether or

(*a*) *Eureka Co.* v. *Bass* (1886), 81 Ala. 200; *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123; *Gulf, etc., R. Co.* v. *Brailford* (1891), 79 Tex. 619.

(*b*) Wharton on Negl. 221, (adopted in *Woodward I. Co.* v. *Jones* (1885), 80 Ala. 123, but disapproved in *Greene* v. *Minneapolis, etc., R. Co.* (1884), 31 Minn. 249).

(*c*) *Connell* v. *Hall* (1888), 145 Mass. 470.

not it had been repaired (*a*). So the servant will be denied recovery where the defect is of such an obvious kind that, if he had been making the ordinary use of his eyesight at the time he was injured, he could not have failed to observe that it had not been repaired (*b*). On the other hand, the right which he has to rely on the master's having performed his duty of carrying out the promised repairs with reasonable promptitude will prevent his being regarded as necessarily culpable, where he has been absent from work for several days after the giving of the promise, and then, without having had an opportunity of examining the machine to which the promise relates, resumes its use in the belief that it has been put in good condition (*c*).

The cases cited in the subjoined note will furnish useful illustrations of the manner in which various courts have treated the question of reasonable time in connection with particular groups of facts (*d*).

VI.—Necessity for showing that the work was continued in reliance upon a promise.—One corollary of the general principle is that, as the master's promise is the new element, the introduction of which deprives the master of the benefit of the presumption which would otherwise arise that the servant accepted the additional risk to which he was exposed, or was guilty of contributory negligence in exposing himself to the risk, a mere protest or complaint by the servant will not be sufficient to overcome that presumption (*e*). Much less will the responsibility be shifted where the complaint is merely that a certain defect increases the difficulty of the work, and not that it is dangerous (*f*).

(*a*) *Schulz* v. *Rohe* (1896), 149 N.Y. 132.

(*b*) *Brewer* v. *Flint, etc., R. Co.* (1885), 56 Mich. 620.

(*c*) *Northern Pac. R. Co.* v. *Babcock* (1893) 154 U.S. 190

(*d*) *Holmes* v. *Clarke* (1861), 7 H. & N. 937; *Eureka Co* v. *Bass* (1886), 81 Ala. 200: *Davis* v. *Graham* (1892), 2 Colo. App. 210; *Cothenberger* v. *Northwestern, etc., Co.* (Minn. Sup. Ct., 1894), 59 N.W. 531; *Weber Wagon Co.* (1891), 40 Ill. App. 585; *Kelly* v. *Fourth of July Min. Co.* (1895), 16 Mont. 484; *Conroy* v. *Vulcan I. Works* (1876), 62 Mo. 35; *Kane* v. *Northern Cent. C. Co.* (1888), 128 U.S. 91; *Flynn* v. *Kansas City, etc., R. Co.* (1883), 78 Mo. 195; *Greene* v. *Mineapolis, etc., R. Co,* (1884), 31 Minn. 248; *International, etc., R. Co.* v. *Williams* (1891), 82 Tex. 342; *Roux* v. *Blodgett L. Co.* (1891), 85 Mich. 519; *Atchison, etc., R.Co.* v. *Lannigan* (1895), 56 Kan. 109.

(*e*) *Railroad Co.* v. *Duffield* (1883), 12 Lea (Tenn.) 67; *Texas, etc., R. Co.* v. *Ringle* (1895), 9 Tex. Civ. App.; 29 S.W. 674; *Galveston, etc., R. Co.* v. *Drew* (1883), 59 Tex. 10; *Weld* v. *Missouri Pac. R. Co.* (1888), 39 Kan. 63. Compare *Wheeler* v. *Berry* (1893), 95 Mich. 250, where the protest was against being required to use machinery outside of his regular employment.

(*f*) *Balle* v. *Detroit Leather Co.* (1889), 73 Mich. 160.

Another proposition involved in the general principle is that the servant cannot interpose the giving of the promise as a reason why the defences of assumption of risks or contributory negligence should not be available to the master, unless he actually remained at work on the faith of the promise. The mere fact that he has some suspicion that the master's assurances will not be made good is not enough to deprive him of the benefit of this principle (*a*). But the reliance on the promise must be justifiable under the circumstances. A mere surmise or expectation based on no specific promise will not be sufficient (*b*).

The servant cannot hold the master liable on the theory that he was induced to remain at work where his own testimony shows that he did not anticipate any danger from the source from which it actually came, and he was fully aware of all the risks to which he was exposed (*c*). Nor will a promise enure to the benefit of the servant where it was elicited simply by the master's regard for his own interests, and not by any wish to secure the servant's safety (*d*).

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work (*e*).

The rule does not require that the promise shall be a formal undertaking. Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise (*f*). Nor is it

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(*a*) *Weber Wagon Co.* v. *Kehl* (1892), 139 Ill. 644, affirming S C. 40 Ill. App. 584.

(*b*) *McKelvey* v. *Chesapeake, etc., C. Co.* (1891), 35 W. V. 500; *Southern P. Co.* v. *Leash* (1893), 2 Tex. Civ. App. 68.

(*c*) *Haloran* v. *Union I. Co.* (Mo. Sup. Ct. 1896), 35 S.W. 260; *Gowen* v. *Harley* (C.C.A., 1893), 56 Fed. Rep. 973.

(*d*) *Lewis* v. *New York, etc., R. Co,* (1891), 153 Mass. 173; 10 L.R.A. 513; *International, etc., R Co.* v. *Turner* (1893), 3 Tex. Civ. App. 487; *Tesmer* v. *Coehm* (1895), 58 Ill. App. 609.

(*e*) *Manufacturing Co.* v. *Morrissey* (1883), 40 Ohio St. 148; *Cothenberger* v. *Northwestern, etc., Co.* (Minn. Sup. Ct., 1894), 59 N.W. 551.

(*f*) *Picart* v. *Chicago, etc., R. Co.* (1891), 82 Iowa 148 *Flynn* v. *Kansas City, etc., R. Co.* (1883) 78 Mo. 195 is a case in which the master was held to have bound himself by what was virtually a promise. In the following cases the remarks which passed were held not to amount to a promise; *Shackelton* v. *Manistee* (Mich. Sup. Ct., 1895), 64 N.W. 728; *Fort Wayne, etc., R. Co.* v. *Gildersleeve,*

necessary that the promise should have been addressed to the plaintiff individually, provided it was made in his presence, and the stipulated repairs will remove a danger to which he is exposed (*a*). Whether there was actually a promise to remove the danger is a question for the jury, when it is a matter of implication (*b*).

The weight of authority is to the effect that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger is equivalent in its legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued (*c*). But some courts seem to incline to the view that the situation is not the same in the two cases (*d*).

VII.—By whose promise the master is bound.—The principles upon which it is determined whether a promise, when given by an employee, binds the master, are the same as those which fix the dividing line between a vice-principal and a mere fellow-servant. That is to say, the promise is or is not deemed to have been given by the master according as the employee who gave it was or was not one charged with the performance of that particular duty of the master the breach of which has produced the servant's danger. The plaintiff, in other words, cannot recover on the ground that the promise

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(1876), 33 Mich. 133; *McAndrews* v. *Montana U. R. Co.* (1894) 15 Mont. 290; *Wilson* v. *Winona, etc., R. Co.* 1887), 37 Minn. 326. A servant is not the less justified in relying on the promise because it does not specify any particular time for performance: *Swift, etc., Co.* v. *Madden* (1897), 165 Ill. 41. A promise that a minor employee will be presently removed from a dangerous place of work will enable his father to recover for an injury received before the removal is effected: *Madara* v. *Pottsville, etc. Co.* (1894), 160 Pa. 109. It is scarcely necessary to say that the fact of a promise having been given will not avail the servant, unless it relates to the same danger as the servant's complaint: *Showalter* v. *Fairbanks, etc., Co.* (1894), 88 Wis. 376.

(*a*) *Atchison, etc., R. Co.* v. *Sadler* (1887), 38 Kan. 128; *Alton* v. *Calvey* (1892), 47 Ill. App. 343.

(*b*) *Stoutenburgh* v. *Dow, etc., Co.* (1891), 82 Iowa 279.

(*c*) *Pieart* v. *Chicago, etc., R. Co.* (1891), 82 Iowa 48; *Atchison, etc., R. Co.* v. *Lannigan* (1895), 56 Kan. 109; *Atchison etc., R Co.* v. *Sadler* (1887), 38 Kan. 128; *Chicago, etc., Co.* v. *Van Dam* (1891), 149 Ill. 337, affirming S. C. 50 Ill. App. 470; *Schlitz* v. *Pabst Brewing Co.* (Minn. Supt. Ct. 1894), 59 N. W. 188; *Southern, etc., R. Co.*, v. *Crocker* (1889), 21 Pac. 785; *Sioux City, etc., R. Co.* v. *Finlayson* (1884), 16 Neb. 578; 49 Am. Rep. 724; *Gowen* v. *Harley* (C.C.... 1893), 56 Fed. Rep. 973.

(*d*) *Sweeny* v. *Berlin, etc., Co.* (1886), 101 N.Y. 520 (remark merely made *arguendo*); *Indianapolis, etc., R. Co.* v. *Ott.* (Ind. App. 1893), 35 N.E. 517. (See, however, the case under the same name in 38 N.E. 842; 39 N.E. 529). In *International, etc., R. Co.* (Tex. Civ. App. 1896), 34 S.W. 161, the court thought that the general principle as to the effect of a promise was not applicable where a section hand was told that a defect in a hand-car would be remedied, and, having been transferred to another car, was injured by the defective car running into it.

was made unless the promisor had authority to take such steps as were appropriate, under the circumstances, to secure the safety of the employees (*a*).

VIII.—Rule where the defective appliance is of a simple kind.—The principles reviewed in the foregoing sections have been held by several courts of high authority to be inapplicable where the promise relates to implements and tools of a simple kind, such as ladders, spades, axes, &c., the theory being that the full comprehension which the servant presumably possesses of the dangers incident to the use of such articles, and the facility with which he can secure his own safety, are sufficient reasons for permitting the ordinary rule to take effect, that a servant who is injured by an instrument the dangers of which he fully understands, is deemed to have been injured by reason of his own fault and negligence. The leading authority for this view is *Marsh* v. *Chickering* (*b*), where it was held that a lamplighter who was injured through the slipping of a ladder which the employer had promised to furnish with hooks and spikes, could not maintain an action. This decision has been followed in several cases presenting similar facts (*c*). It is extremely difficult, however, to discover any rational basis for the distinction which the courts have made between the effects of the servant's knowledge in cases of this type and those in which the general rule has been applied. As the servant's full appreciation of the risk is the primary and essential circumstance upon which his contributory negligence is predicated, it should be quite immaterial

(*a*) *Ehmcke* v. *Porter* (1891), 45 Minn. 338. The following cases will furnish illustrations of this rule, but the Canadian lawyer should remember that the views of the courts of the different States in the Union are extraordinarily conflicting in regard to doctrine of vice-principalship: *Wust* v. *Erie City I. Works* (1892), 149 Pa. St. 263; 24 Atl. 291; *Galveston, etc., R. Co.* v. *Eckols* (1894), 7 Tex. Civ. App. 429; *Lyttle* v. *Chicago, etc., R. Co.* (1890), 84 Mich. 289; *Patterson* v. *Pittsburgh, etc., R. Co.*, (1874) 76 Pa. 389; *Weber Wagon Co.* v *Kehl* (1892), 139 Ill. 644, affirming 40 Ill. App. 584; *Pieart* v. *Chicago, etc., R. Co.* (1891), 82 Iowa 148; *Homestake Min. Co.*, v. *Fullerton* (C.C.A. 1895), 69 Fed. Rep. 923; *Louisville, etc., R. Co.* v. *Kenley* (1894), 92 Tenn. 207; *Chesapeake*, etc., *R. Co.* v. *McDowell* (Ky. Ct. of App. 1894), 24 S. W. 607; *Shackelton* v. *Manistee, etc., R. Co.* (Mich. Supr. Ct. 1895), 64 N. W. 728; *Gulf, etc., R. Co.* v. *Brentford* (1890), 79 Tex. 619.

(*b*) 101 N.Y. 396.

(*c*) *Corcoran* v. *Milwaukee Gaslight Co.* (1892), 81 Wis. 191; *Railway Co.* v. *Kelton* (1892), 55 Ark. 933; *Meador* v. *Lake Shore, etc., R. Co.* (1894), Ind. ; 37 N.E. 721 (all cases in which the injury was caused by defective ladders); *Gowen* v. *Harley* (C.C.A. 1893), 56 Fed. Rep. 973; *Brewer* v. *Tennessee, etc., Co.* (1896), 97 Tenn. 615.

whether that appreciation related to complicated or to simple instrumentalities. The question whether the knowledge of the conditions which the parties possessed by the parties was equal would appear to be of no moment except where the continuance of work has been induced both by a promise of repairs and by an assurance that the defect is not so serious as to threaten immediate injury. It may be a perfectly sound argument that the servant is not justified in relying on the master's judgment in regard to the prospects of safety while repairs are being made in an appliance of a very simple kind. But it is not apparent why, in the case of such an appliance as in the case of any other, the inference may not be drawn that the master has assumed the responsibility for accidents while the repairs are being executed, nor why the servant should not be entitled to hold the master to the performance of the revived or modified contract which, as we have seen, is implied by a promise to remove a cause of danger.

C. B. LABATT.

OBITER DICTA.

Allen v. *Flood*,—that end-of-the-century crux criticorum—has reaped its first crop of forensic promiscuity in this country in the case of *Perrault* v. *Gauthier*, decided by the Supreme Court during its February sittings, (28 S.C.R. 241.) We have not space to discuss the facts of the latter case, our present purpose being merely to indicate a curious difference of opinion between Girouard and Taschereau, JJ., as to the applicability thereto of the ratio decidendi in *Allen* v. *Flood*. Mr. Justice Girouard in the course of a most painstaking judgment (which constitutes, by the way, a valuable comparative study of the French and English laws on the subject of trades-unionism) declares in one place that *Allen* v. *Flood* is "a similar case" to the one then under consideration by the Supreme Court. In another place he adds: "the facts in the two cases are very similar in many respects, although in some *Allen* v. *Flood* is much stronger

for the non-union men." Again he says; "In the two cases the contest was between union men and fellow-workmen . . . the members were bound by regulations not to work with outsiders; there was no violence, nor threat of violence; the non-union men in both cases were working by the day." In fact his views throughout appear to proceed upon the theory of legal analogy between the two cases. On the other hand, Mr. Justice Taschereau, with all the incisive brevity and directness characteristic of his judicial method, thus disposes of the pertinency of the English case:—"Tant qu'à la cause *d' Allen* v. *Flood*, il me semble que même si la décision de la Chambre des Lords eût été en sens contraire; nous avons dans l' espèce un état de choses si différent, que le résultat n' en aurait pas été plus favorable à l' appellant." (*Angliee:* "So far as the case of *Allen* v. *Flood*, is concerned, it seems to me that even if the decision of the House of Lords had been the other way, we have in the present case a state of facts so different that such a result would not have been more favourable to the appellant.") All of which goes to show the truth of Pope's aphorism:—

> "Tis with our judgments as our watches—none
> Go just alike, yet each believes his own."

* * *

We are all proud of the splendid axiom of our law that "England is too pure an air for slaves to breathe in;" but we are apt to assign the date of its enunciation to a much too early period in the development of our legal system. This august phrase was first uttered by the judges in *Cartwright's Case* in the eleventh year of Elizabeth's reign (Rushworth's Hist. Collect., vol. 2, p. 468); but the principle that inheres in it did not become a sociological factor in English history until some time after that. The Anglo-Saxons imported the practice of slavery in its worst forms into Britain; and we are told that under their domination the peasants were sold like cattle, and given away as presents whenever their masters felt inclined to be generous. (Cf. Stubbs, 1 Const. Hist., 4th

ed. 83; and 1 Kemble's "Saxons," 199). Even that great reformer, Alfred, was not able to secure a larger betterment of the condition of the serfs than subsists in his enactment that a Christian slave, if bought, should be free after serving six years, unless he consented to remain a slave, when his master might "bore his ear at the Church door, and so ear-mark him as his own property." (Paterson's "Lib. of the Subject," vol. 1, p. 490). The term "villein" became substituted for that of "slave" after the Conquest; but it was the merest euphemism until the reign of Edward I. It is sufficient to bring a blush to the cheek of the race who proudly sing: "Britons *never* will be slaves!" to remember that the cardinal liberties obtained by Magna Charta expressly enure to *free* men only. The *Mirror of Justices* naively avers that the serfs were omitted from the benefits of the Charter because they had nothing to lose. (See Selden Society's ed., p. 80). Then in the great struggle for the liberty of the subject that marked the reign of Charles I., we find such advanced democrats as St. John and Littleton declaring that the born freemen of the land were treated by the King and his minions as no better than villeins (3 St. Tr. 86, 1263). Bacon, in his "Maxims," harbours the delusion that "villeinage is part of the law of nature;" while that pious ruffian, Sir Edward Coke (2 Inst. 28), with apparent relish, defines the status of the villein under Magna Charta to be somewhat below that of the brute. In *Sommersett's Case*, Mr. Serjeant Davy, arguendo, (20 St. Tr. 79) makes a witty commentary upon the axiom which is the subject of our present enquiry. He there says:—"The air of England had been gradually purifying ever since the reign of Elizabeth." In that case a negro slave was brought before the King's Bench upon a habeas corpus, and after hearing argument the court discharged him from the custody of his master, whose ship was lying in the Thames. The report of the case is a valuable repository of learning on the subject. It is to be remarked, however, that in the year 1827 Lord Stowell did not find that the air of England had become so surcharged with the ozone of liberty as to enable him to declare that where a West India slave had accompanied

her mistress to Great Britain and then voluntarily returned with her to her home, the slave was forever purified of the taint of bondage by reason of her temporary residence on English soil. (See 2 Hagg. Ad. Rep. 94).

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MISREPRESENTATION—ADVERTISING GOODS FOR SALE BY RETAIL AT WHOLESALE PRICE—DAMNUM ABSQUE INJURIA.

Ajello v. *Worsley* (1898) 1 Ch. 274, was a somewhat curious action. The plaintiff, a piano manufacturer, complained that the defendant, a retail dealer in pianos, for the purpose of injuring the plaintiff's trade advertised pianos of the plaintiff's make for sale by retail at less than the wholesale price, when he had no such pianos in his possession, and he claimed an injunction to restrain the further publication of such advertisements. Sterling, J., was of opinion, however, that the plaintiff had no cause of action, even though the defendant's advertisements were a misrepresentation and he was not in fact able to sell the pianos at the price named, and even though it was established by evidence that the plaintiff suffered damage on account of defendant's advertisements; and although the plaintiff's counsel only asked at the bar an injunction restraining the defendant from advertising pianos of the plaintiff's manufacture for sale unless he had actually on hand pianos of the class advertised, yet even in this limited form the injunction was refused. Here again the principle of *Allen* v. *Flood* was invoked, and the doing of a lawful act, though from a sinister motive, was held not to be actionable.

PRACTICE — WRIT—SERVICE OUT OF JURISDICTION — 'NECESSARY PARTY'' — ORD. XI., R. 1, (*e*), (*g*): (ONT. RULE 162, (*e*), (*g*)).

In *Deutsche National Bank* v. *Paul* (1898) 1 Ch. 283, a point of practice was decided by Stirling, J., involving the construction of Ord. xi., r. 1, (*e*), (*g*), (Ont. Rule 162, (*e*), (*g*)).

The action was brought by the plaintiff to enforce a charge on two policies of insurance by foreclosure. Two of the defendants were trustees for the plaintiffs of the equity of redemption in the policies, and the other defendant, one Ebbeke, was a subsequent chargee on the policies. Both of the trustees resided within the jurisdiction, and the plaintiffs claimed to be entitled to join Ebbeke, who resided out of the jurisdiction, as a defendant as "a necessary party" to the action against the trustees; but Stirling, J., held that the case did not come within Ord. xi., r. 1, (*e*) or (*g*), (Ont. Rule 162, (*e*), (*g*)), because the action was not founded on any breach of contract, and inasmuch as no relief was asked against the trustees, they were not properly made defendants, but should have been joined as plaintiffs; the action was, therefore, not properly brought against them, and Ebbeke could not, therefore, be deemed a necessary party within the meaning of sub-sec. (*g*). An order authorizing service on Ebbeke was therefore discharged, on Ebbeke's application.

POWER—APPOINTMENT IN FAVOUR OF TRUSTEE FOR OBJECTS OF POWER—LEGAL ESTATE.

In re Paget (1898) 1 Ch. 290, presented for adjudication the question whether, if in the exercise of a power of appointment of realty, the appointment is made in favour of a trustee for the objects of the power, such an appointment is effectual to vest the legal estate in the trustee. Kekewich, J., answered this question in the affirmative, who held that the same rule applied to realty as to personalty in this respect.

SOLICITOR EXECUTOR—WILL—PROFIT COSTS—POWER TO CHARGE PROFIT COSTS—LEGACY—INSOLVENT ESTATE.

In re White (1898) 1 Ch. 297, is a case in which a solicitor who was executor of an estate had power under the will to charge profit costs for professional services rendered by him to the estate. The estate in question was insolvent and the point Kekewich, J., was called on to decide was whether the solicitor was, as against creditors of the estate, entitled to be allowed his profit costs out of the estate; and he came to the conclusion that the power to make the charge was in the nature of a legacy which could not be claimed to the preju-

dice of creditors. According to this decision therefore, a power to make such a charge in favour of a solicitor executor, is nugatory if the estate turns out to be insolvent.

COSTS—TRUSTEES OF IMPEACHED SETTLEMENT, RIGHT OF, TO COSTS—PARTIES BENEFICIARIES—SETTING ASIDE SETTLEMENT.

Merry v. *Pownall* (1898) 1 Ch. 306, was an action by trustees in bankruptcy to set aside a settlement of his life estate made by the bankrupt, whereby, on his bankruptcy, his life interest was cut down. The trustees of the settlement submitted that the beneficiaries entitled under the impeached limitation should be made parties and the plaintiff accordingly added them as defendants. At the hearing it was conceded that the settlement so far as it affected the bankrupt's life estate was void as against the plaintiff, and the only material question which remained was as to the costs. Kekewich, J., held that the trustees having acted properly and not having put the plaintiff to unnecessary expense, were entitled to deduct their costs from the income of the trust estate in their hands notwithstanding the settlement as to the same was set aside. As regarded the beneficiaries he was of opinion that, although they were proper parties, they were not necessary parties, and were not entitled to costs as against the plaintiff or out of the trust estate.

LIS PENDENS—DISCHARGING REGISTRATION OF LIS PENDENS—LIS PENDENS ACT, 1867, 30 & 31 VICT., C. 47, S. 2 - (ONT. JUD. ACT, SS. 97-100.)

Baxter v. *Middleton* (1898), 1 Ch. 313, was an action for specific performance, which had been registered as a lis pendens, and which was, at the trial, dismissed with costs. Upon the application of the defendant, the Court included in the judgment an order under 30 & 31 Vict., c. 47, s. 2, (see Ont. Jud. Act, s. 98), vacating the registration of the *lis*, unless the plaintiff set down an appeal from the judgment within a fortnight. Under the practice in Ontario the registration of the judgment dismissing the action would practically vacate the lis pendens : see *Dexter* v. *Cosford*, 1 Chy., Ch. 22; *Graham* v. *Chalmers*, 2 Chy. Ch. 53; but a question might arise whether a subsequent purchaser would be protected by such registration of the judgment, if on an appeal

to the Court of Appeal it should be set aside; and it seems doubtful whether the incorporation in the judgment of an order expressly vacating the registration of the lis would, in the event of such order being reversed, be a protection to a subsequent purchaser.

COMPANY—WINDING UP—DIRECTORS' FEES—COMPANIES' ACT, 1862 (25 & 26 VICT., C. 89), S. 38, S.S 7.

In re New British Iron Co. (1898) 1 Ch. 324, was a winding-up proceeding, in which the right of directors to rank as creditors, for arrears of fees due to them as directors at the date of the winding-up order, came in question. The articles of association provided that the remuneration of the directors should be the annual sum of £1,000, to be paid out of the funds of the company. This provision, Wright, J., was of opinion distinguished the case from that of *Ex p. Cannon*, 30 Ch. D. 629, and brought it within the principle of *In re Dale*, 43 Ch. D. 255, and the payment of the remuneration to the directors was consequently not dependent on the mere bounty of the shareholders, but that the articles amounted to a contract to pay the stipulated remuneration, and therefore it was not "a sum due to a member" in his character of member, by way of dividends, profits or otherwise, within the meaning 25 & 26 Vict. c. 89, s. 38. The case would be much stronger in Canada, where there appears to be no similar provision in the Dominion Winding-up Act.

COMPANY — WINDING UP — SURPLUS ASSETS—ADJUSTMENT OF RIGHTS OF SHAREHOLDERS INTER SE—EQUALIZATION OF SHARES.

In re Anglo-Continental Corporation (1898) 1 Ch. 327, was also a winding-up proceeding, in which the question arose as to the proper mode of distributing the surplus assets of the company. The shares of the company were of par value of £1 each; 100,000 were issued on which only 5s. each had been paid; 25,000 other shares had been issued which were fully paid up. No calls were ever made. After paying debts and expenses, sufficient assets remained to pay the holders of the 25,000 shares 15s. per share, but insufficient to repay all the paid-up capital on the 125,000 shares. The articles of association provided that, if, on the winding-up, the surplus

assets should be insufficient to repay the whole of the paid-up capital, such surplus should be distributed so that as nearly as possible the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. Under these circumstances Wright, J., held that the holders of the 100,000 shares were liable to a call, actual or in account, of 3s. per share, out of which the holders of the 25,000 shares were entitled to be paid 12s. per share, which would have the effect of making the whole 125,000 shares paid-up to the extent of 8s. per share, and that the surplus was then divisible *pro rata* between the holders of the whole 125,000 shares.

Correspondence.

To the Editor of the Canada Law Journal:

SIR,—Is not the decision in *Piper* v. *Kings Cure Co.*, ante p. 167, strictissimi juris, or even, with deference, of questionable propriety? It appears not to have been the usual case, contemplated in the Rule, of a defendant asking for relief from a judgment entered in consequences of a default in pleading by his own or his solicitor's accidental laches. Then, indeed, we see a reason why the rule should apply that he must produce an affidavit not only alleging but, "showing" merits; but in this case the defendant's solicitor, living in a remote part of the Province, had done all that he could possibly do; his defence, posted in time and properly addressed, went astray in the mails, his solvency was undoubted, and the plaintiff was not to lose a term, except by her own act in appealing. Surely where the default was in the post office, which every one relies on, there is a discretion in the judge to put a defendant in statu quo on a reasonable colour of bona fides, to interfere with which is to put a premium on sharp practice and unduly encourage appeals on matters of minor importance.

JUS.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] WOODBURN *v.* THE QUEEN. [Jan. 17.

Practice—Appeal—Extension of time—Order of reference—Amendment of record—Laches.

An order of reference had been settled in such a way as to omit to reserve certain questions which the Court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement, and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed, and the referee's report filed. After final judgment in the action the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended. Under the circumstances the Court extended the time to appeal but refused to amend the order of reference as settled.

E. L. Newcombe, Q.C., D.M.J., for motion. *R. V. Sinclair*, contra.

Province of Ontario.

COURT OF APPEAL.

From Rose, J.] IN RE GROSS. [Feb. 18.

Extradition—Offence referred to by wrong name—Theft—Larceny.

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name. Larceny is by the Ashburton Treaty, the Convention of 1889 and the Extradition Act, specified as a crime for which extradition to the United States will lie, but larceny is not, by that name, recognized as a crime by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing."

Held, affirming the judgment of ROSE, J., that where there was evidence of the commission of the crime of theft the prisoner should be held for extradition, although in the proceedings for extradition the offence was described as larceny.

J. F. Faulds, for the prisoner. *J. W. Curry*, for the Crown.

From Robertson, J.] DWYRE *v.* CITY OF OTTAWA. [March 15.

Injunction—Interlocutory order—Balance of convenience—Municipal corporations—By-laws regulating procedure.

A by-law of a municpal corporation passed under s. 283 of the Consolidated Municipal Act for the purpose of regulating procedure, requiring work exceeding $200 in value to be done by contract after tenders had been called for, was on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms, in pursuance of which the contractors entered into other contracts with the corporation and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:

Held, that as the applicant's legal right was not clear and as serious loss and public inconvenience would necessarily result from granting the order while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.

Judgment of ROBERTSON, J., reversed.

W. Nesbitt, and *H. E. Rose*, for appellants. *McCarthy*, Q.C, and *D. L. McCarthy*, for respondents.

HIGH COURT OF JUSTICE.

MacMahon, J.] MACDONALD *v.* LAKE SIMCOE ICE CO. [Jan 29.

Navigation—Carriage of ice—Right to cut passage through harbour.

The cutting of a channel through ice formed on a water lot in a harbour to enable ice cut outside of such water lot to be conveyed to an ice house on the shore of such harbour, is a use of the said water lot for the purposes of navigation, and therefore the owner of such water lot, whose grant was subject to the rights of navigation, cannot interfere with such user.

W. MacDonald, for the plaintiff. *McPherson* and *Urquhart*, for the defendants.

Divisional Court.] CALLAGHAN *v.* HOWELL. [Feb. 14.

Will—Legatee—Devise of real estate—Payment of legacy out of rents and profits.

A testator, after a bequest of a legacy to the plaintiff, amongst others, made a devise to his daughter M. of "my two farms," describing them, and all the rest of his property of whatsoever kind; and in case of her marriage to her "sole and separate use," and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered, but the daughter took possession of the whole estate and received the rents and profits of the

farms. She subsequently mortgaged the farms and they were sold by a first mortgagee under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee.

Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the said farms, the provision in the will therefor being clear, and was not affected by the subsequent words, or as to the executors "should seem best"; but that her right to arrears of interest must be limited to six years; that the fact that sufficient annual produce of the farms has been received which, if set apart, would have paid off the legacy, was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her said possession and receipt, and her grantee or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed; that said balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that after the payment thereof, it could be paid out to the subsequent mortgagee.

W. H. Blake, for the appellant, H. E. Thompson. *Clute*, Q.C., for the plaintiff. *Mosson*, for the defendant Howell. The other defendants were not represented.

Divisional Court.] HAIGHT *v.* HAMILTON STREET RAILWAY. [March 3.

Street railways—Accident—Negligence—Infirm man.

The plaintiff, an old man, over ninety years of age, lame, very infirm, and almost deaf and blind, while attempting to cross over a street crossing in a city, was run into by one of the defendants' electric cars and injured. The plaintiff was walking at a snail's pace, his manner and actions being strange, and were observed, not only by persons some distance off, who, thinking he was in danger, attempted unavailingly to warn him, but also to the motorman, who thought he might be drunk, and said he could have stopped the car before reaching the plaintiff, had he not thought the plaintiff saw the car and would have got out of the way, but that when he did attempt to stop, it was too late.

Held, that there was evidence of negligence to go to the jury.

Crerer, Q.C., and *P. D. Crerer* for defendants. *J. Lynch Staunton* for plaintiffs.

Meredith, C. J.] [March 11.

SMEDLEY V. BRITISH AMERICA ASSURANCE CO.

Discovery—Production of documents—Contradicting affidavit—Admissions of deponent—Examination for discovery—Documents mentioned in document produced.

Where, in an action upon a fire insurance policy, the plaintiff, in making discovery of documents, referred in his affidavit to the application for the insurance, which, when produced, showed that at its date he had a set of books connected with the business in respect of which he was effecting the insurance, which books, however, he did not produce.

Held, that the books were material, and the reference to them in the document produced was sufficient ground for ordering a better affidavit on production.

Quære, whether the admissions of the plaintiff upon his examination for discovery as to the existence of documents other than those mentioned in his affidavit could be looked at to contradict the affidavit.

Washington, for plaintiff. *H. D. Gamble*, for defendants.

Street, J.] ANDREW v. CANADIAN MUTUAL LOAN CO. [March 19.

Division Court—Attachment of debts—Wrong primary debtor—Same name—Recovery by rightful owner—R.S.O. 1887, c. 51, s. 195.

In an action to recover a sum of money held by a company as a deposit to the credit of the plaintiff in which the company showed that the whole amount had been paid into court and to the creditors of another person of the same name under garnishee judgments in a Division Court, without any knowledge of the mistake being made.

Held, that there was nothing in such proceedings to bar the plaintiff of his right to recover or to protect the defendants against his claim; that the judgments in the proceedings did not apply to money in their hands belonging to the plaintiff, but to money which they erroneously supposed was in their hands belonging to the other person

Held, also, that sec. 195 of R.S.O. 1887, c. 51, only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person.

Joshua Denovan, for plaintiff. *Watson*, Q.C., and *A. McLean Macdonell*, for defendants.

Falconbridge, J.] CHAPIEWSKI *v.* CAMPBELL. [March 19.

Free grant lands—Sale of timber by locatee—Subsequent issue of patent to vendor—Estoppel.

A locatee of free grant land under R.S.O. 1877, c. 24, has no power to sell the trees or timber thereon, and the subsequent issue of the patent to him will not feed the estoppel and validate a previous grant or sale.

J. H. Moss, for the plaintiffs. *E. T. English*, for defendants.

Boyd, C.] BAKER *v.* STUART. [April 2.

Devolution of Estates Act—Widow's election—Election more than year from death—Administration by Court—R.S.O. 1897, c. 127.

Appeal from the ruling of Master in Ordinary.

A testator died in August, 1896, and by judgment of March 18th, 1897, in action for construction of his will, an intestacy as to lands was declared, and that the widow was entitled to dower thereout, notwithstanding benefits received by her under the will. A reference to the Master to sell the lands and distribute the proceeds was made, and the lands were sold in October, 1897, and the proceeds were now in Court. On March 14th, 1898, the widow filed a statutory deed of election to take a distributive share of the estate instead of dower.

Held, that notwithstanding R.S.O. 1897, c. 127, s. 13, providing that real estate not disposed of within a year shall vest in the heirs, it was not too late for her thus to elect, the money being in Court and the estate not distributed on the footing of her having retained the right to dower.

E. D. Armour, Q.C., for appellant. *J. H. Moss* for respondent.

Meredith, C.J., Rose, J., MacMahon, J.] [April 4.

CAMPBELL *v.* FARLEY.

Parties—Claim against partnership—Action against surviving partner—Third party notice—Indemnity or relief over—Administratrix of deceased partner—Concurrent administration proceedings—Claim upon collateral security.

An appeal by the defendant Farley from the order of Street, J., ante , setting aside an order permitting the appellant to serve a third party notice upon Jennie MacDonald, was dismissed, the Court agreeing with the opinion of Street, J.

Tremeear, for the defendant Farley. *W. E. Middleton*, for Jennie MacDonald.

Boyd, C.] FLEURY V. CAMPBELL. [April 5.

Discovery—Examination of party—Criminal conversation—Alienation of affections—R.S.O. 1897 c. 73, ss. 7, 9.

An action for criminal conversation and for alienating the affections of the plaintiff's wife is an action instituted in consequence of adultery within the meaning of s. 7 of the Evidence Act, R.S.O. 1897, c. 73, and a defendant in such an action acnnot be compelled to submit to examination for discovery. *Mulholland* v. *Misner*, 17 P.R. 132; 32 C.L.J. 286; *Taylor* v. *Neil*, ib. 134; 32 C.L.J. 286, and *Lellis* v. *Lambert*, 24 A.R. at p. 664, referred to. Sec. 9 of the Act has no reference to such an action.

J. W. McCullough, for the plaintiff. *C. C. Robinson*, for the defendant.

Boyd, C.] IN RE TEASDALL *v.* BRADY. [April 6.

Married woman—Action against—Debt contracted before marriage—Form of judgment—Division Court—After-judgment summons—Disobedience—Order to commit—Contempt—Punishment—Execution.

A married woman was sued in a Division Court for a debt contracted before marriage, and judgment was given against her personally and against another for the amount of the debt.

Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; and an application upon habeas corpus to discharge her from custody under an order made in the Division Court for her committal for failure to attend upon an after-judgment summons was refused. *Scott* v. *Morely*, 20 Q.B.D. 123, followed. *Re McLeod* v. *Emigh*, 12 P.R. 450, distinguished, and doubted in view of *Aylesford* v. *Great Western R.W. Co.* (1892), 2 Q.B. 626.

Quære, whether such an order to commit is by way of punishment or execution.

Shepley, Q.C., for applicant. *W. Cook*, for plaintiff.

Ferguson, J.] REG. EX REL. HALL *v.* GOWANLOCK. [April 7.

Municipal elections—Petition—Concurrent motions—Collusion—R.S.O., 1897, c. 223, s. 227.

Sec. 227 of the Municipal Act providing that where more motions than one are made to try the validity of an election, all shall be made returnable before the Judge who is to try the first of them, and the Judge may give one judgment upon all or a separate judgment upon each one or more of them as he sees fit.

Held, when such a motion was made before a County Court Judge, and it appeared that a prior motion was pending before the Master in Chambers, the former had no jurisdiction to go on and hear the motion before himself, although he found the proceedings before the Master to be collusive.

Prohibition granted.

(Motion to Divisional Court argued April 13th and 14th, 1898, and stands for judgment.)

Marsh, Q.C., and *G. G. S. Lindsey*, for respondent. *Du Vernet*, for relator.

Ferguson, J.] KEEFER *v.* PHŒNIX INSURANCE CO. [April 7.

Insurance—Fire—Vendor and purchaser—Fire after contract of sale—Right of insured to recover whole loss.

Action on policy of insurance for $1,740, insuring Keefer, "his heirs and assigns." Before obtaining the policy, Keefer had, unknown to the defendants, contracted in writing to sell the property for $2,000, of which $1,300 had been paid by the purchaser before the fire.

At the time of sale Keefer and the purchaser verbally agreed that until the purchase money was paid Keefer would keep the property insured for $2,000.

Held, following *Parcell* v. *Grosser*, 1 Atl R. 909 (1885), that the parol contract was a separate and distinct collateral agreement, and evidence of it could be given, as it was not contradictory to the written contract.

Held, also, that "heirs and assigns," in the policy meant heirs or assigns of the property, and the purchaser was an "assign," and that Keefer could recover not only his actual loss ($700) but the residue of the loss by fire also, the latter as trustee for the purchaser.

Collier, for plaintiff. *Aylesworth*, Q.C., for defendants.

Boyd, C.] WILSON V. BOULTER. [April 9.

Parties—Indemnity—Relief over—Third parties—Identity of claims—Negligence—Breach of contract.

In an action to recover damages for injuries sustained by the plaintiff in the defendants' factory in October, 1897, the negligence charged was that there was a defect in the lugs holding fast the doors of a retort, whereby they were broken by the force of steam, and the plaintiff thereby injured from the escape

of hot air, etc., and that the retort was dangerous because not furnished with a safety valve, whereby the lugs were exposed to an undue pressure of steam. The defendants sought to bring in as third parties the manufacturers of the retort, which was made in January, 1896, under written contracts, which contained no warranty, and from which it appeared that the defendants undertook to provide and put in their own fittings, including the safety valve.

Held, that the object of the Rules permitting a third party to be brought into action is to prevent the same question, common as between the plaintiff and defendant and the defendants and the third party, from being tried on different occasions and in different forms, and there was no such identity here; and there could be no claim for indemnity against the manufacturers. If the defendants could recover at all, their damages would be assessed on a different principle from those of the plaintiff; and no relief over could be obtained.

Arnoldi, Q.C., for proposed third parties. *R. McKay*, for defendants. *W. H. Blake*, for plaintiff.

Boyd, C.] DAVIDSON v. COCHRANE. [April 12.

Attachment of debt—Imperfect gift—Assignment of bank account—Vesting.

Mrs. C., the primary debtor, had a savings bank account with a bank. She wrote in her pass-book an assignment of the money in favour of her son, and left the book with a third party to be delivered by him to the son when the latter attained 21 years of age. She did not notify her son of this, nor the bank.

Held, that the assignment to the son was not complete, and the money remained the mother's.

In cases of alleged gift, the test is whether everything has been done that is required in law to be done to transfer the property. If not, the gift is incomplete, the property is still in the alleged donor, and the court will not assist a volunteer to complete what is lacking.

A. P. Poussette, Q.C., for claimant. *Hall*, for judgment creditor.

SURROGATE COURT OF THE COUNTY OF YORK.

RE RENFREW ESTATE.

Probate—Jurisdiction of Surrogate Court—Succession Duties—"Aggregate value."

Held, 1. That the authority conferred by the Surrogate Courts Act has not been limited or interfered with by the provisions of the Succession Duty Act, and that the Surrogate Judge is bound, when requested so to do, to determine whether a particular estate of which probate or administration is sought is liable or not to pay duty.

2. That the whole scope and object of the statute is to tax (1) All the property of a deceased person situate in the Province, no matter where the deceased has his domicile, and (2) In the case of a person dying, domiciled in the Province, to tax all personal property owned by such deceased outside the Province which in the course of administration must or ought to be brought into the Province for administration or distribution to persons or beneficiaries domiciled within the Province.

Expression "aggregate value of the property" defined.

[TORONTO, March 23rd, McDOUGALL, Sur.].

The testator died in September, 1897, domiciled in the Province of Que-

bec, possessed of an estate in that Province considerably over $50,000, and of an estate in the Province of Ontario of a value under $100,000, the aggregate exceeding $100,000. He devised his whole estate, wheresoever situate, to his wife and children. The executors applied to the Registrar of the Surrogate Court, of the County of York for probate, whereupon the Registrar required the executors to satisfy the Provincial Treasurer as to payment of succession duties (if any). The Provincial Treasurer then made a claim for payment of succession duties, and refused to authorize the issue of letters probate until the duty had been paid, or the executors had filed a bond to secure the payment of the same. Application was then made to the Judge of the Surrogate Court, of the County of York, for issue of probate without filing the bond provided for in R.S.O. c. 24, s. 5.

D. T. Symons for the executors. No one appeared for the Provincial Treasurer.

McDOUGALL, Sur. J.—The first question to be determined is, Have I jurisdiction to make the order asked for? S. 17 of the Surrogate Court Act, R.S.O. 59, reads as follows: "All jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking of probate of wills and letters of administration of the effects of deceased persons having estate or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration shall continue to be exercised in the name of Her Majesty, in the several Surrogate Courts: but this provision shall not be construed as depriving the High Court of jurisdiction in such matters." S. 18 further defines the express powers of the Surrogate Court—"To hold cognizance of all matters relative to the granting of probates, and committing letters of administration and to grant probate of wills, and committing letters of administration of the goods and persons dying intestate, having property, etc., in Ontario. (2) To hear and determine all questions, causes and suits in relation to the matters aforesaid, etc." S. 5 of the Succession Duties Act directs executors and administrators to file inventories and lists of persons to whom the property passes, stating the degree of relationship they bear to the testator or intestate, and reuqires them to pay the duty or file a bond, the penal sum of which shall be equal to 10 per cent. of the sworn value of the property of the deceased person, "liable or which may be liable to succession duty." But by sub-sec. 2 of the same section it is expressly enacted that s. 5 shall not apply to estates in respect of which no succession duty is payable. By s. 13 of the same Act the Surrogate Judge is given power to extend the time for the payment of the duty; and by s. 18 he is further given power to make an order for the payment of duty which appears to him not to have been paid in respect of any estate.

It appears to me that the authority conferred by the Surrogate Court Act has not been limited or interfered with by the provisions of the Succession Duties Act, and that I am bound, when requested, to determine whether a particular estate of which probate or administration is sought (in the Surrogate Court, of the County of York) is liable or not to pay duty. Any judgment I may pronounce is subject to appeal under s. 36 of the Surrogate Court Act.

Now, as to the merits of the application, s. 2 of the Succession Act defines "property" in the Act as including real and personal property of every description, and every estate and interest therein capable of being devised or bequeathed by will, or of passing at the death of the owner to his heirs or personal representatives. S. 3 enacts, that the Act shall not apply where the property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, son-in-law or daughter-in-law of deceased does not exceed $100,000. Mr. Renfrew bequeathed his whole estate to his wife and children, so that the estate in question comes within this exception unless it exceeds $100,000 in value.

S. 4 defines what property is subject to succession duty: "(a) All property situate in this Province . . . . whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death, or was domiciled elsewhere, passing either by will or intestacy."

Sub-s. 3 reads as follows: "Where the aggregate value of the property of the deceased exceeds $100,000 . . . . passes to wife, children, etc., etc, it will be liable to $2 50 on every $100 of value." Sub-s. 8 is an important sub-section as throwing light upon the intention of the Legislature. This provides that any portion of an estate of any deceased person brought into the Province (whether at the time of his death such person was domiciled in Ontario or elsewhere) by his executors or administrators to be administered or distributed in Ontario, shall be liable to the duty; but it enacts that if such property so brought in paid duty elsewhere, such duty if equal to the Ontario duty will extinguish the same, or if less, the difference only shall be payable to the Treasurer of Ontario. Sub-s. 9 makes an executor or administrator personally liable for the duty, if, in order to escape payment, he distributes assets outside of Ontario; but this sub-section is not to apply to payments made to persons domiciled outside the Province from assets situated outside the Province.

It appears to me that the whole scope and object of the statute is to tax (1) All the property of a deceased person situate in the Province, no matter where the deceased has his domicile, and (2) to tax in the case of a person dying, domiciled in the Province, all personal property owned by such deceased person outside the Province, which in the course of administration must be, or ought to be brought into the Province for administration or distribution to persons or beneficiaries domiciled within the Province. This is a partial adoption or application of the principle of "mobilia sequuntur personam" evolved in the construction of the English Legacy and Estate Duty Acts.

Now, it is unnecessary for me to express any opinion upon the meaning of the expression "aggregate value of the property" as applied to the case of the estate of a person domiciled in Ontario. The matter before me relates only to the estate of a deceased person, who prior to and at the date of his death had his domicile outside this Province. As to such a person I have no hesitation in stating it as my opinion that the expression "aggregate value of the property" can only mean the aggregate value of the property situate in the Province of Ontario, to which would be added any property situate outside the Province but brought into Ontario by executors of such a person to be paid to beneficiaries domiciled in Ontario. It appears to me this is the only property

of a non-domiciled testator or intestate that the Province has the right under our Constitutional Act to tax. See s. 92, B.N.A., sub-heads (2), (13). They cannot tax real or personal property situate outside the Province. That the Legislature appreciated this view is fairly indicated, I submit, by sub-sec. 8 of s. 5 of the Succession Duties Act, where the provision is made that property situate outside is only liable to duty when brought into the Province. It is also shown by the provision of sub-sec. 9 of the same s. 5, which enacts that the executor or administrator shall be personally liable to pay the duty in all cases where he, in order to escape the payment of duty, distributes outside the Province any estate which for the purpose of such distribution ought properly to have been brought into the Province for that purpose. Such would be payments made or shares paid to persons who at the time of such payment or distribution had their domicile in Ontario.

I make the following findings of fact and law: —(1) That the deceased had his domicile prior to, and at the time of his death, in the Province of Quebec; (2) That the value of his property and estate situated in the Province of Ontario is under the sum of $100,000; (3) That as by the terms of his will he devised the whole of his estate in this Province to his wife and children, the said property in this Province, being under the value of $100,000, is not liable to pay succession duty. In case there should be an appeal from this judgment, and to have the facts clearly before the Appellate Court, I further find as a fact: (4) That the said G. R. Renfrew, at the date of his death, was possessed of, and there passed under his will, property situate in the Province of Quebec, the value of which, if added to the value of the property in this Province, would in the aggregate exceed $100,000 in value.

NOTE.—The following cases may be referred to as bearing on the matter discussed:—*Blackwood* v. *Regina*, 8 App Cas. 82, and *Henty* v. *Regina*, L.R. (1896) A.C. 567.

In the case above reported, notice of appeal has been given by the Provincial Treasurer.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] POWER *v.* PRINGLE. [March 8.

Pleading, defects in—Duty of trial judge to amend, or give defendant the option of amending—O. 19, R. 27—Pleading disclosing reasonable grounds of defence—Held not objectionable under O. 25, R. 4.

The action by plaintiff, as a solicitor and stipendiary magistrate, to recover a sum of money claimed to be due him for work and labor performed in connection with the collection of certain accounts. The defence set up an agreement that the costs and charges claimed were not to become payable until one H. paid the amount of a judgment recovered against him. Plaintiff

applied under O. 19, R. 27, and O. 25, R. 4, to strike out paragraphs 4 and 5 of defendant's defence, as disclosing no reasonable or legal answer to the action.

Held, 1, that the paragraphs in question were defective in not setting out when the agreement relied upon was made, and whether it was made in writing or by parol, etc., but that where objections of this character are raised, especially in small matters, the proper course is not to strike out the paragraphs, but to direct them to be amended.

2. The case was one in which the Judge of the County Court to whom the application was made should himself have amended the pleadings without waiting to be asked by counsel to do so, and should then have disposed of the case upon its merits, or should have given the defendant the option of amending; and that he was wrong in refusing the application *in toto*.

3. The pleadings were not objectionable under O. 25, R. 4, because they disclosed a reasonable ground of defence, although it was not set up in accordance with the rules respecting pleadings.

4. The order below must be set aside, but the cost below and the costs of the appeal should be made costs in the same, and that defendant should have leave to amend.

F. T. Congdon for appellant. *H. McInnes* for respondent.

Full Court.] CHISHOLM *v.* PETERS. [March 8.

Sale of interest in invention pending application for patent—Mistake of one party not a "mutual mistake"—Word "patent" as used in sales note.

Defendant sold to plaintiff an interest in an improvement made by H. in window sashes, in connection with which an application for a patent was then under consideration in the Patent Office at Washington. A note or memorandum of the sale handed to plaintiff by defendant read as follows:—"460/500 shares in Horton Sash Patent at $2, $920; less by cash $62.50, Settled by note," etc.

The patent applied for was refused on the ground that the improvement claimed was not new, and plaintiff thereupon brought action to recover back the money paid.

Plaintiff's evidence was to the effect that defendant purported to sell him an interest in a patent already granted. Defendant's evidence was that he was interested with H. in an invention called "The Horton Sash Patent," for which they were endeavouring to secure a patent in the United States, with the view of putting the patent upon the market and obtaining a profit therefrom, and that plaintiff purchased the shares knowing this and agreeing to take his chances of the patent being granted and the invention proving profitable. Judgment was given in favour of plaintiff for a return of the money claimed on the ground that there had been a mutual mistake.

Held, that this was wrong and that the judgment must be set aside, the mistake, if any, having only been on the part of plaintiff, and the cause sent back for a new trial, costs to abide the event.

Held, that the terms of the sales' note were in plaintiff's favour but that

it was still competent to defendant to show that the term "Horton Sash Patent" did not imply that the patent had actually been granted, and that plaintiff in getting the interest in the invention got all that he bargained for.

H. Mellish, for appellant. *H. McInnes*, for respondent.

Full Court.] BAULD v. ROSS. [March 8.

Unrecorded deed—Return of, and request to convey to third party—Rights of judgment creditor of grantor subsequently recording his judgment—Registry Act, R.S., c. 84, ss. 18 and 21.

M. K. R. conveyed a tract of land, etc., to his son M. D. under an agreement that upon the performance of certain conditions by his other son, P. one-half of the land conveyed to M. D. should be conveyed by him to P. P. performed the conditions named and a deed of one-half the land was made and delivered to him in accordance with the terms of the agreement. P. never recorded the deed made to him, and subsequently at the request of P., and on the return of the deed made to him, M. D. conveyed the land to C. W. R., who paid a portion of the consideration money in cash to M. D., and the balance by a promissory note to P. On March 8th, 1893, subsequent to the making and recording of the deed to C. W. R., plaintiffs recovered judgment against M. D. and registered it so as to bind lands on the same day. Under this judgment plaintiffs sought to bind the interest of P. in the land conveyed to M. D. on the ground that under the Registry Act, R.S., c. 84, ss. 18 and 21 the deed from M. D. to P. was void against a judgment creditor subsequently registering his judgment, and that the title never having been revested in M. D. plaintiffs' judgment took priority over the deed to C. W. R.

Held, that the deed to C. W. R. having been made bona fide and for valuable consideration, there was no legal or equitable right in plaintiffs as creditors of M. D. under which they could avoid it.

Held, also, that plaintiffs did not come within the terms of the statute which only gives precedence over an unrecorded deed, while here there was a recorded deed of the land they sought to bind, which, if in any way defective, the statute gave them no right to attack.

Held, also, that knowledge on the part of C. W. R. of the prior deed to P. was unimportant in an action by plaintiffs.

Plaintiffs' action dismissed with costs, and costs of the appeal.

D. McNeil, Q.C., for appellant. *J. A. Chisholm*, for respondent.

Full Court.] O'HANDLY v. DOOLEY [March 8.

Magistrate—Action against—Directions to constable held to be mere advice.

The defendant J., as a justice of the peace, issued execution on a judgment recovered by A. against A. O'H. The execution was placed in the hands of the defendant D., a constable, who levied under it upon a waggon upon the premises of the judgment debtor.

Shortly afterwards A. wanted the waggon removed from the premises of A. O'H., where it had been left, and the constable consulted the justice, who

said to him, "Well, if he wants it removed, go and bring it in." There was a dispute as to the ownership of the waggon at the time, plaintiff claiming that it was his property, but it did not appear that the magistrate when he told the constable to bring it in was aware of this

In an action by plaintiff to recover possession of the waggon, which appeared to have belonged to him, it was sought to make the justice liable on account of the direction given to the constable.

Held, that in the absence of evidence that the magistrate at the time he gave the direction to the constable knew of the claim made by plaintiff, his reply to the constable must be regarded as having been made merely as advice, and that in any case the question was one for the trial judge, and a question of evidence merely, and he having determined the question in favor of the magistrate, plaintiff's appeal must be dismissed with costs.

F. F. Mathers and *J. A. Mackinnon*, for appellant *J. A. Chisholm*, for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] [Feb. 22.

LE BLANC v. COVENANT MUTUAL BENEFIT ASSOCIATION.

Life insurance certificate—Pleading.

In an action on a life insurance certificate defendants pleaded inter alia that no demand of the amount payable under the certificate was made at their office in Galesburg, Illinois, and by reason thereof by the laws of the State of Illinois the plaintiff could not recover upon the said certificate; and further, that the death of the insured was from a cause exempted by the provisions and agreements contained in the said certificate.

Held, on a motion to rescind a judge's order striking out these pleas, that the plea as to the demand at Galesburg was embarrassing and therefore bad, but that the other plea as to the cause of death was good.

W. B. Chandler, for plaintiff. *A. H. Hanington*, Q.C., for defendant.

Full Court.] ROBICHAUD *v.* LA BLANC. [Feb. 22.

Conviction for stealing trees—Appeal under s. 900, Criminal Code—Title to land—Jurisdiction of magistrate.

Defendant was convicted before a stipendiary magistrate under s. 337 of the Criminal Code, of stealing seven trees the property of the plaintiff. The parties owned and occupied adjoining farms in the rear of which the lands were covered with wood and the dividing line was not distinct. Defendant, while cutting wood on his own lot, cut seven trees over the line claimed by the plaintiff but within a line which he (defendant) alleged to be the dividing line, and hauled them away. The magistrate found that the criminal intent was proved and that the title to land did not bona fide arise. Defendant appealed under s. 900 of the Criminal Code.

Held, Per TUCK, C.J., BARKER and HANINGTON, JJ., that the conviction could be attacked on appeal as "erroneous in point of law," that the title to land was bona fide in issue and the magistrate ousted of jurisdiction, and that under the circumstances no criminal intent was proved.

Held, by VAN WART, J., that the magistrate having found against the bona fides of the defendant, the conviction could not be attacked on appeal as "erroneous in point of law" and that the title to land did not bona fide arise.

Held, by LANDRY, J., that the evidence justified the conviction. MCLEOD, J., took no part.

W. Van Wart, Q.C., for complainant. *J. D. Phinney*, Q.C., for defendant.

Full Court] RYAN *v.* MCNICHOL. [Feb. 22.

Agreement for sale of physician's practice—Covenant not to practice—Injunction.

Plaintiff, a physician and surgeon, who had an established practice at Sussex worth about $2,400 a year, contemplating removal to California, entered into an agreement with the defendant by which he leased to him his office and premises for two years from July 1st, 1894, at an annual rental of $200. The agreement contained a covenant by the defendant, as lessee, that he would at the end or other sooner determination of said lease either purchase the plaintiff's house and lot at Sussex at the price of $3,500, or would "forthwith leave and depart from said parish of Sussex, and would not for a period of at least three years next thereafter reside in said parish or practice thereat either as physician or surgeon . . . or elsewhere within ten miles thereof." The plaintiff covenanted that he would cease to practice as a physician or surgeon in the said parish for two years from July 1st, 1894, or until breach of some one or more of the defendant's covenants, and that if the defendant should purchase the house and lot aforesaid he (plaintiff) would not practice his profession in Sussex for three years next succeeding said July 1st, 1894.

Held, on appeal from the judgment of the Equity Court, granting an injunction restraining the defendant from practising at Sussex, that a physician's practice is capable of sale so as to form a consideration for such a covenant, and that the covenant was not invalid as being in restraint of trade and contrary to public policy.

Appeal dismissed with costs.

Leonard Alison and *White*, Attorney-General, for plaintiff. *J. M. McIntyre*, *L. A. Currey*, Q.C., and *C. N. Skinner*, Q.C., for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Killam, J.] WATSON *v.* DANDY. [March 15.

Referee in Chambers, jurisdiction of—Queen's Bench Act, 1895, Rules 26 and 804—Sale of land under registered certificate of judgment—"Now."

Rule 804 of the Queen's Bench Act, 1895, for the first time provided that a Judge in Chambers might make an order on notice of motion for the sale of

land bound by a registered certificate of judgment. Before that it was necessary to file a bill in equity to realize the lien of the judgment. Rule 26 of the same Act empowers the Referee in Chambers "to do such things . . . and exercise all such authority and jurisdiction as . . . are *now* done . . . or exercised by him or by any Judge of the Court sitting in Chambers," with certain specified exceptions; and Rule 28 provides that all applications which may be made to the Referee in Chambers shall be so made.

Held, that the Referee has no jurisdiction to entertain application under Rule 804; and that Rule 26 applies only to the powers, authority and jurisdiction which at the time of the coming into force of the Act and Rules; but, independently thereof, a Judge in Chambers had; and it was only after they came into force that a Judge in Chambers could make the order provided for by Rule 804.

Appeal from the Referee allowed with costs, and his order for sale of the land set aside.

Clark for plaintiff. *Hull* for defendant.

Killam, J.] MOORE *v.* KENNEDY. [April 4.

Practice—Setting aside judgment—Leave to defend—Queen's Bench Act, 1895, Rules 339 (a), 655.

The chief point decided in this case is that under rules 339 (a) and 655 of the Queen's Bench Act, 1895, a defendant seeking to set aside a judgment entered by default is not obliged to show the existence of a defence on the merits as clearly as was required in order to set aside a judgment on default of appearance under the Common Law Procedure Act, but there is a discretion to let him in to defend if the Judge thinks that under the circumstances he ought to be permitted to defend.

The plaintiff's claim was for damages for breach of a contract to deliver a quantity of wheat, and the defendant bona fide intended to contest the claim, but made a mistake as to the time of service and tried to put in the defence only one day too late. The judgment signed was interlocutory and an assignment of damages was still required.

Defendant was cross-examined on his affidavit filed on his motion for leave to defend, and it was by no means clear on his own showing that he had a good defence on the merits. The Referee, however, made an order setting aside the judgment and allowing defendant to file a statement of defence on condition of payment of costs.

Held, on appeal, that the Referee had a discretion to allow a defence to be entered and that his order should not be interfered with. Appeal dismissed with costs, to be costs in the cause to the defendant in any event.

Phillips, (Allen and Cameron) for plaintiff. *Metcalfe*, for defendant.

Taylor, C.J.] UNION BANK *v.* BARBOUR. [April 11.

Fraudulent conveyance—Bona fide purchaser—Garnishment.

Plaintiffs, who had recovered a judgment against James Barbour, in 1896, brought the present action against him and his wife, and one Warman, for the

purpose of realizing the amount of their judgment out of a parcel of real estate which they claimed to have been conveyed by Barbour to his wife with intent to defeat and defraud them Mrs. Barbour had afterwards sold the property to Warman; but he had not paid his purchase money in full, and the plaintiffs alleged that the money still due from Warman to Mrs. Barbour was really the money of James Barbour, and ought to be made available for payment of their judgment, and that Warman should be ordered to pay to them a sufficient amount of the purchase money to satisfy their judgment and the costs of the suit. There was no doubt in the mind of the learned Judge that the conveyance to Mrs. Barbour was fraudulent against creditors, but Warman by his statement of defence claimed to be a bona fide purchaser of the property for value, and that he had paid all of the purchase money except $365, and stated that he was ready and willing to pay this over in accordance with the directions of the Court. The plaintiff's counsel at the trial accepted Warman's statement that he was a purchaser for value, and as to the amount still due from him.

Held, following *Stuart* v. *Freeman*, 3 O.R. 190; *Tennant* v. *Gallow*, 25 O.R. 56; and *Ross* v. *Dunn*, 16 A.R. 552, that the right of a plaintiff to attack a transaction by which property is conveyed by the judgment debtor to a fraudulent grantee is derived from the statute, and goes no further than the setting aside of the fraudulent conveyance, and that a creditor cannot take proceedings for that purpose after the property had passed from the hands of the fraudulent grantee into those of a purchaser for value. If Mrs. Barbour had sold the property and received the money, the plaintiffs could have no remedy against her, neither could they have any right to call upon a bona fide purchaser from her to account for any money still remaining due.

Masuret v. *Stewart*, 22 O.R. 290, dissented from.

Action dismissed without costs as against the Barbours. Defendant Warman held entitled to his costs.

Taylor, (Souris,) for plaintiff; *Acheson*, for the Barbours; *A. D. Cameron*, for Warman.

Killam, J.] MCILROY *v.* MCEWAN. [April 19.

County Courts Act, R.S.M., c. 33, s. 37—Counter claim—Jurisdiction of County Court—Transfer to Queen's Bench.

In this case the defendant put in a counter-claim for an amount beyond the jurisdiction of the County Court, without abandoning the excess as required by s. 67 of the County Courts Act, R.S.M., c. 33, and then applied for an order to transfer the action to the Court of Queen's Bench.

Held, that the condition to the right to set up the counter-claim at all under s. 67 was the abandonment of the excess, and it should either be deemed to have been abandoned, in which case a transfer to the Queen's Bench is not authorized, or the counter-claim was improperly put in for the whole amount, in which case the defendant could not by so doing obtain a right to have the action removed into the Queen's Bench, or to take away the plaintiff's right to have his claim tried in the County Court. Application dismissed without costs.

Hull, for plaintiff. *Bradshaw*, for defendant.

Province of British Columbia.

EXCHEQUER COURT.

ADMIRALTY DISTRICT

Davie, C.J., McWHA *v.* THE "PENTICTON."

Judgment in rem—Execution in personam.

Judgment having been given against the ship and execution issued but returned nulla bona, application was made for judgment against the owners. The Court having been satisfied by the evidence that B was the owner, though not registered as such and though appearance had been entered in the name of the ship and not of the owner,

Held, that the plaintiffs were entitled to their order chiefly on the authority of *The Dictator*, P.D. (1892) 304, where it was decided that in case of an execution on a judgment in rem being returned unsatisfied, leave may be given to sign judgment and issue execution against the owners.

SUPREME COURT.

Walkem, J., McColl, J., Irving, J.] [April 1.

GWILLIM *v.* LAW SOCIETY OF BRITISH COLUMBIA.

Legal Professions Act, 1895, s 37, sub-sec. 5—Construction of.

This was an appeal by the defendants from an order made by Mr. Justice Drake whereby the defendants were ordered by their proper officer to enter the name of the plaintiff on their books as an applicant for admission as a solicitor of the Supreme Court of British Columbia as of 15th July, 1897, and declaring him entitled to be admitted after the expiration of six months residence and compliance with the rules of the Law Society. The plaintiff was admitted as an advocate in the North-West Territories after a three years' studentship as prescribed there. He was afterwards and without any further probation admitted in Manitoba, a Province in which students and articled clerks are required to study or serve under articles, as the case may be, the term of five years before call or admission. Sub-sec. 4 of s. 37, of the Legal Professions Act, 1897, British Columbia, lays down a standard of qualification for the position of solicitor. "With respect to residents of this province, a studentship, under a practising solicitor, of five years' duration, reducible to three years in the case of graduates of any recognized university of the United Kingdom or Canada, is, amongst other things, required; and with respect to solicitors of the United Kingdom, or any of the superior courts of the colonies, or of the provinces of Canada, who come here for admission, a probationary term of six months has to be spent."

Then follows sub-sec. 5: "Provided, also, that any barrister or solicitor who shall base his claim for call or admission upon his having been called or admitted, as the case may be, as a barrister or solicitor in some place or Pro-

vince where barristers or solictors are called or admitted after a term of study or articles less than five years (except in the case of a graduate of any recognized university of Great Britain or Ireland, or the Dominion of Canada), must, before call or admission in this Province, serve as a student-at-law, or under articles, for a sufficient time to complete the full term of five years."

The defendants contended that the plaintiff came under the provision of sub-sec. 5, and therefore, would have to serve under articles for the further term of two years.

Held (IRVING, J., dissenting), that the whole Act must be read together, and the words "bases his claim for admission," are not to be construed literally so as to defeat the object of the Act, which establishes a standard of five years service; and that the plaintiff having served only three years in the N. W. T., did not, by his subsequent admission in Manitoba, bring himself outside the provisions of sub-sec. 5.

Per WALKEM, J.,—Reading the two sub-sections together, it seems to me that the Legislature has plainly said: "Our standard of qualification is, amongst other things, a studentship, in the case of residents here, of five years, reducible to three years in the case of university graduates, and in the event of any other Province or place having a similar standard of service, its practitioners will be admitted without any further service; but should its term of service be less than five years—save as to university graduates—the full service of five years shall be completed here."

Appeal allowed without costs, defendant's counsel stating that the Society did not ask for costs, and had agreed to pay the plaintiff's costs of the appeal.

A. E. McPhillips, for appellants; *A. L. Belyea*, for respondent.

North-West Territories.

SUPREME COURT.

Richardson, J.] BANK OF MONTREAL v. RICHARDSON. [March 31.

Married woman—Separate estate—Contract of married woman—Separate estate exigible—Estoppel—N. W. T. Act, s. 40.

Plaintiff sued husband and wife claiming $7,000 on a promissory note signed by both defendants in favor of L. S. & Co., and endorsed to plaintiff. The principal defence was that the wife was at the time of the making of the note a married woman residing with her husband, and was not possessed of any separate property. The evidence showed that the wife previous to the signing of the note had assigned to L. S. & Co. her interest in an agreement for sale by the C.P.R. to her of 640 acres of land: that although the assignment was absolute in terms it was given as collateral security for the debt, which latter was represented by the note in question. The agreement with the C.P.R. for the purchase of the land was made in the wife's name, although the husband swore he himself paid the instalments of the purchase money. The

husband had himself prepared and delivered the assignment to L. S. & Co. It also appeared that the wife subsequently to assigning to L. S. & Co. assigned the land and agreement to T. & Co., who, thereafter and before the commencement of the action, paid the balance due to the C.P.R. Co. and obtained a deed of the land. It was urged on behalf of the wife, relying on *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454, that admitting the wife had separate estate at the time of the contract, she had since ceased to be possessed of any, and that there could not now be a judgment against her on the contract. For the plaintiff it was contended a judgment would bind not only the property she was possessed of or entitled to at the date of the note sued on, but also all or any property thereafter acquired by her, and in support of this contention plaintiff relied on *Wagner* v. *Jefferson*, 37 U.C.R. 577; *Moore* v. *Jackson*, 22 S.C.R. 239. Plaintiff's counsel also urged that the defendants having represented that the wife had an interest in the land and thereafter assigned that interest, they were estopped from setting up that it was not the wife's property.

Held, that there should be judgment against both defendants for full amount of claims and costs. That the interest of the wife in the land was separate estate. That the judgment as against her, following *Scott* v. *Morley*, 20 Q.B.D, should be a proprietary one and be limited to her separate estate. That the defendants having represented the land as the wife's property were estopped from now claiming it was not then her separate estate.

Hamilton, Q.C., for plaintiff. *H. A. Robson*, for defendants.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

Rouleau, J.] IN RE HANEY *v.* MEAD. [March 24.

Coroner—Doctor who attended deceased not competent to hold inquest.

This was an application of M. J. Haney, manager of construction of Crows Nest Railway for a writ of prohibition to prohibit Dr. H. R. Mead, of Pincher Creek, from further proceeding with an inquest in connection with the deaths of two men from diphtheria, employed by a contractor on the said railway. The grounds upon which the application was made were: 1. That the coroner had no jurisdiction to hold such inquest. 2. That he was a necessary and material witness upon said investigation and inquest. 3. That he was directly and personally interested in said inquest and investigation.

The facts as set out in the affidavits read on the application were that the two men in question were brought in the company's ambulance to the end of the track, and Dr. Mead, the said coroner, was immediately called in to attend them. Both men died the night after their arrival while under Mead's care. Mead then proceeded to hold an inquest upon the said deaths although it had been pointed out to him by counsel (C. E D. Wood) for applicant that having been in professional attendance upon the men at the time of their death, he would be a necessary witness, and it was not proper for him to act in the dual capacity of judge and witness.

Held, that a coroner is a judge of a court of record, and that the same

person cannot be both a witness and a judge in a cause which is on trial before him; and that in this case the coroner was a necessary witness. In delivering judgment the judge said: "In this case there is a dangerous precedent to be avoided. A physician, who is at the same time a coroner, in order to avoid prosecution for malpractice, would have only to call a jury and hold an inquest on the body of his victim and the law would be powerless to prevent him."

Ordered granted for writ of prohibition.

The following cases were referred to in the judgment: *Queen* v. *Farrant*, 57 L.J.M.C. 17; Greenleaf on Evidence, 14th ed., s. 369; *Reg.* v. *Sproule*, 14 O.R. 375; *Reg.* v. *Brown*, 16 O.R. 41; *People* v. *Miller*, 2 Park. Crim. Rep. 197; *People* v. *Dohring*, 59 N.Y. 374.

James Muir, Q.C., for applicant. *R. B. Bennett* for coroner.

Book Reviews.

The Rating of Mines and Quarries, by ARCHIBALD BROWN, M.A., of the Middle Temple, barrister-at-law. London: Butterworth & Company, 7 Fleet street, Law Publishers, 1898.

This is a short summing up of the law of rating generally. and it has special application to mines, iron works and quarries. It has special application to the law as it stands in Great Britain, but the instances and illustrations will occasionally be found applicable in this country, and there are now many in this country, which is showi " signs of being the greatest mining country in the world, who desire all information attainable in these matters.

The Law of Meetings, by GEORGE BLACKWELL, LL.B., Inner Temple, barrister-at-law. London, Butterworth & Company, 7 Fleet street, Law Publishers, 1898.

This little book relates to meetings convened for social, political and other purposes, by persons under no legal liability to hold such meetings, and meetings convened by corporate bodies, to discharge their statutory or common law duties. The profession are largely familiar with the law contained in this book, so far as it is of general application.

Outlines of Law of Torts, by RICHARD RINGWOOD, M.A., of the Middle Temple, barrister-at-law, etc. Third edition London: Stevens & Haynes, Law Publishers, Temple Bar. 1898. 289 pp.

The first edition of this book was based upon a course of lectures on the law of torts delivered by Mr. Ringwood when lecturer on Common Law for the Council of the Incorporated Law Society. In the present edition many fresh cases of importance have been added, and the recent judgment of the House of Lords in *Allen* v. *Flood* (1898), App. Cas. 1, is discussed. The writer also deals with Workmen's Compensation Act, 1897, and notes the decisions on the Employer's Liability Act, 1880.

Flotsam and Jetsam.

SOME LEGAL RESULTS OF WAR.—In the event of a war between the United States and Spain, the effect upon English commerce is a matter which has excited some attention.

One result of the outbreak of war would be that either belligerent would have the right to search any merchant vessel upon the high sea to ascertain its nationality and the nature of the cargo on board. Resistance to the right of search, according to the rule which has been emphatically affirmed in the British Prize Courts, renders the ship liable to condemnation.

The United States and Spain are not parties to the Declaration of Paris. Consequently they are not bound by the rule that the neutral flag covers the cargo. Therefore a British ship carrying a cargo belonging to either belligerent could be taken by a ship of the other belligerent to a convenient port for the purpose of having the cargo condemned. Under such circumstances the usage is for the captor to pay freight to the captured ship.

Goods which are contraband of war, destined for the use of the enemy, are liable to confiscation, and freight is not allowed in respect of them to the carrier. The carriage of contraband goods does not, however, according to the prize law of most countries, render the ship liable to any other penalty in the absence of fraud or other aggravating circumstances. There are dicta in one or two English cases that when the shipowner is privy to the carriage of contraband goods, his ship is liable to condemnation; but there is no English or American case in which such a principle has been clearly established.

A ship which violates an effective blockade is, together with the cargo, intended for the blockaded port, liable to capture.

It is, however, clearly established that by English law trade in contraband goods or to a blockaded port is lawful for a British subject when this country is neutral. Therefore a charter made by a British shipowner for the purpose of running a blockade could not be repudiated by him. On the other hand, performance of a contract to carry goods to a port which, before the loading, becomes blockaded, is excused when the charter contains an exception of restraints of princes. And even without this exception the shipowner would, it is thought, not be bound to carry out his contract, on the ground that the adventure had been frustrated by circumstances not contemplated when the contract was made.—*Law Journal*, (*Eng.*)

At a New England society dinner some years ago, Mark Twain had just finished a piquant address when Mr. Evarts arose, shoved both of his hands down into his trousers pockets, as was his habit, and laughingly remarked: "Doesn't it strike this company as a little unusual that a professional humorist should be funny?" Mark Twain waited until the laughter excited by this sally had subsided, and then drawled out: "Doesn't it strike this company as a little unusual that a lawyer should have his hands in his own pockets?"